2005-42-0

Reeves & Gould's

Letters

Volume IV

Contents

Reeves & Goulds Lectures

Volume IV

Contents

Prerogative Writs
Pleas Pleadings
New Trials
Writs of Error
Evidence
Powers of Chancery

Prerogative Writs

Prerogative Writs

Writ of Mandamus by & Gen'l

This is a Prerogative Writ of Mandamus in England from K.B. and extends in some degree in its effect to the Equitable relief afforded in Ch'y. It may issue from Ch'y (it seems) But the right is now exercised in K.B. only — 3 Com. 110; Salk. 429; 1 Vern. 175

It is granted in those cases only which relate to the Government of the Public and where without it there would be a failure of Justice to enforce obedience to acts of the Legislature and (in England) to the Kings Charters: to prevent disorder from a failure of justice and a defect of police & there being no other specific remedy. — 3 Bac. 529; 2 Doug. 524; 4 Mod. 281; 3 Burr 1266

It is generally not granted when there is an adequate remedy by Action — 2 Doug. 524 & 4; 1 Chit. 148; Cowper 377.

But it is granted in Conn. by the Sup. Ct.

The object of the writ is generally to restore a person to some Corporate or other franchise or right which concerns the Public or the administration of Justice and of which he is deprived or to admit a person to the same rights &c — Ed. 6. 051; 11 Coke 93; 3 Bac. 529

The writ issues agt. some public Officer body Corporate or inferior Ct commanding a performance of their Official or Corporate Duty — 3 Bac. 528; 4 Mod. 52

It is a writ demandable of right and the

3 Bac: 528 The Ct of B R is not bound to grant it's writs in inferior Courts

Stag: 1003
Do — 1154
1 Lewin 64
Pro Reg: 66
Cas L: 552
Cas L: 661
Pro Reg 431
1 Salk: 14
1 Ld Raym 77
4 Burn 1999
Pulton 170
Stag: 113
2 Ventr 871
3 Bac: 535-6
Cas L: 602.
3 Bac: 534.
Carth 457.
Salk: 299.
Stag: 552.
Cas L: 663
2 Stag: 879
1 Wilson 305

3 Bac 529
Do — 530.
1 Coke 94
2 Salk: 422
Doy — 48
1 Ld Raym 143
Do — 153
Pro Reg 211
2 Stra 1172
1 Rolle 535
Salk: 175
Cowp 371
Do — 377
3 Bac 530
1 Lewin 48
1 Ventr 549
1 Ld Raym 11.

Cas L: 665
1 Wilson 11
1 Ld Raym 331
4 Inst 125

Ex officio is construed Offices or Confirmations to Calls meetings to hold elections & attend by Law & within duty.

To restore a person to any Jurisdiction or Ecclesiastical Office. E.G. to restore Clerk without-mention Constables &c should be illegally refused & thus Office

To Command persons on authority to do what is right. E.G. to the Judge of an inferior Ct to proceed to Judg: The Ecclesiastical Ct (or Ct of Probate in Conn.) to grant Probate of a Will or Administration to whom it belongs.

Office to a Clerk of a Corporation requiring him to deliver up the Books & Rolls of Corporation on his being removed from Office

It is not seized by any general rule what Offices concern the public or administration of Justice to which privileges to be allowed or denied. The Writ has been granted in modern times

It has been decided that the Office of Mayor — Alderman — Common Councilman — Town Clerk — Constable — Sheriff's Clerk — Sexton &c in England

So Writs to restore one to the Place or Office of Attorney in an inferior Ct. So to our Courts Ct

The Office in these Cases must be of an Ecclesiastical nature. Power or Office under an establishment or institution. conc'd on 3

on voluntary subscriptions – not endowed. is not entitled to it.

But the office need not be created. It is sufficient that it was annual office and had been annexed. This must extend the writ to all our public offices in Conn.[t] Where in Conn.[t] to command a County Treasurer to pay money to a Member of the County. So to command Justices to lay a County Tax. — Esp.[e] 666 1 Roll.[s] 140

When the office is merely of a private nature the writ will not be granted. E.G. in England the office of Steward of a Bishop — Esp.[e] 666 1 Sid.[l] 40 1 Vent.[s] 143

The Conn.[t] office of private Companies – as Libra ry Companies would fall under the description of private offices. Quere As to Fire like Companies incorporated. The grant of incorporation is anal ogous to the Kings Charters — 3 Bac.[o] 528 pl.[l]

The writ never goes to compel an act by a Corporation to which it is immediately liable or to which they by Law have a right to do it — Esp.[e] 666 1 Will.[iam] 266

Nor when there is another specific legal remedy E.G. It goes not to a Bank to compel a transfer of stock. for Cash lies. — Esp.[e] 666 Doug.[l] 506

It never is granted to Compel a Corporation to do an act when the doing of it is discretionary — Esp.[e] 668, 2 Stra.[nd] 881 2 Burr.[o] 708

If persons are elected of a Franchise office the each must have a Peremptory Mandamus they cannot join. the wrongs are distinct. and the Causes may be different — Esp.[e] 668, 9 Salk.[d] 433 Burr.[o] 709

Mode

Mode of Granting the Writ

Cas. P. C. 609
3 Bac. Ab. 388
Bulle. 199
Do. — 200
3 Burr. 1711
Say 160

It is not usually granted in the first instance tho' it sometimes is. The usual mode is by a rule to shew cause and this is not granted but on affidavit by the Party applying. But upon shewing sufficient cause it will issue in the first instance on motion. Q. to sign peremptorily in England

Cas. P. C. 670
Bulle. 199

It is never granted after there has been a default. It goes not to prevent a default.

Cas. P. C. 672
Salk. 433
Do. — 436

The Writ is directed to the person whose duty it is to perform the act commanded, not to another to perform the act done

Cas. P. C. 637.
Salk. 439
Do. — 701
1 Stra. 553

When the act ought to be done by a part of a Corporation aggregate it may be directed to the whole Corporation or to that part which is to do the act, but not to any other part.

When sufficient cause agt. issuing the writ is not shewn the writ shall issue at first in the alternative to do the act, or shew reason why not. If the Defendt returns a sufficient reason he is excused the reason being true.

3 Burr. 1711

Cas. P. C. 648.
1 Vent. 111
Salk. 144 332
Doug. 134
3 Bac. Ab. 543
2 Ray. 1481

And at C. Law the return of the Writ &c could not be traversed. But Case lay for false return. Now by Stat. 9 G. 4 of Anne it may be traversed or in other cases pleaded to. Our Ct. have adopted the reasons of this Stat. Some

Since this Act. if the return is false (which is a question to be tried by the Jury) the party injured has a peremptory mandamus and also an action on the Case for such false return. 3 Bl. Com 111 Est. 648.

At C.L the only remedy for a false return is an action on the Case. And if the false return were made by several the action may lie agst all or any. If being for a false return for not executing the writ" in the return (NB Judge Reeve says the action for not having on the Case was unknown to the Courts Westminster 2nd — gives them no to the above. NB) Est. 648, 3 Bl. Com 311 11 Coke 99 Est. 685 3 Bac. 544 Carth 171-2 2 Doug. 144 # Contra Vol 3rd 481.

But if any one of several sued voted, agst the false return and was exempted no recovery can be had agst him. If the return is insufficient as on the face of it a peremptory mandamus issues Est. 685 Carth. 172 2 Ray. 564 3 Bl. Com 111 Est. 685 Bull 201

If the return is false in the action on the Case a peremptory mandamus issues. Provided the action is in the same Ct in which the application was made. (i.e. in B.R or our Sup. Ct) Est. 580 3 Bac. 544 Salk. 430.

If no return is made an attachment issued for Contempt after a peremptory rule to return the writ. See Stra. 808 that the attachment must go agst all tho' some would have made a return. Contempt is punishable by fine or imprisonment or both. and in some cases with corporal or infamous punishment. Est. 685 3 Bl. Com 111 3 Bac. 542 Salk. 429 Do — 434 4 Bl. Com 287 Cooke 140

Writ of Prohibition by St Jones

This is a Prerogative Writ issuing generally from B.R. to prevent inferior Cts from proceeding Cases out of their jurisdiction.

3 Bl Com 112
4 Bac 240
4 Com Dig 487
Fitz N B 39. 40
12 Coke 61
Ca - - - 279
Hob 19
Sherm 523
4 Bacon 241
12 Coke 58
4 Com Dig 489
1 Mc R 476

And it may also issue out of Ch. Cy Com. Pleas and Exchequer. 3 Bl Com 112. 1 R.W. 470

It is directed to the inferior Ct and the Party and is founded on a Suggestion that the Cause itself or some Collateral question arising in it, is out of the inferior Cts jurisdiction.

3 Bl Com 112

The mode of obtaining a Prohibition is in a rule to shew Cause why &c. and in many instances affidavit must be made that the Cause or question &c is out of the inferior Cts jurisdiction. "Mitford" shews that fact as appears from the face of the declaration libel &c. of the inferior Ct.

4 Bac 244
1 R.W. 473
Salk 549
Holt 593
Hob 79
2 Ld Ray 1211

Whether the awarding of Prohibitions is "ex debito justitiæ" or discretionary the authorities are contradictory the better is that it is discretionary.

4 Bac 242
Hobart 67
Tho Ray 3. 4
1 Sid 65
Salk 33
2 Ray 220
D° 578, 586
Tho Ray 92

It has in some instances when the inferior Ct has jurisdiction of the Cause &c when a Statute has been passed regulating the proceedings in such Cause and the inferior Ct deviates from those regulations This Case and the want of jurisdiction are said to be the only ones in which a Prohibition can issue

2 Mc R 100

If the Cause suggested is sufficient the writ issues

3 Bl Com. 113 issues. &c after the writ to shew cause. Note if the cause is insufficient The writ commands the Ct not to hold plea, and the party not to prosecute,

3 Bl Com. 113
4 Bac. 248
6 co Eliz 730
Cro Eliz 148
Fitz NB. 44
1 Levinz 125
Willes 151
6 co Eliz. 730
4 Bac. 248.

But if the sufficiency of the cause is doubtful or a question of difficulty, the party is driven to obtain an prohibition. i.e. to prosecute an action, by filing a Declaration agst the opposite party upon a fiction not traversable, that the latter has proceeded in a suit contrary to a prohibition before granted

4 Bac 248 n.

The Declaration must follow the suggestion The action is regularly founded with, and the question of the sufficiency of the cause suggested, tried upon the pleadings. If the cause suggested is adjudged insufficient Judg with nominal damages is given for the Pl and prohibition issues

3 Bl Com 114

If insufficient — Sugg for the Defts and a writ of Consultation awarded. i.e. a writ issued upon deliberation. as Consultation lead. restoring the cause to the jurisdiction Ct to be there determined notwithstanding the former suggestions & prohibition

3 Bl Com 114

So too a writ of Consultation is sometimes granted when the cause has actually been prohibited. i.e. the party prohibited may take a Declaration, assuming the suggestion, and traverse the fact on which prohibition was founded. and if the issue is found for him a Consultation issues.

The Ct itself by its own mere motion —

Some —

sometimes award a Consultation. eg where upon further Consideration it thinks the suggestion insufficient — Disobedience to the writ is a Contempt punishable by fine and imprisonment at the discretion of the Court

It is also a Contempt to commence a new suit in the same Ct for the same thing after a Prohibition

On the attachment for Contempt the Pltf recovers damages and Costs for the others proceeding after the Prohibition

We have an Act vesting the power of granting Prohibitions in the Supr Ct. & enabling the Chief Judge or two assistant Justices to do it in Vacation. This Act adopts the English Law on the subject

3 Bl Com 114
4 Com. 517
4 Bac 202
5 Vin Ab 40
Do — 279
4 Bl Com 287
4 Bac 202
Mod 566
1 Lev 111
1 Vent 348
3 Levy 300
Stat 347-8

Writ of Habeas Corpus

This is a writ by which a person restrained of his liberty may be brought before some Supr. Ct. for some Special purpose either on his own application to be relieved from confinement or to obtain justice or upon behalf of some other person having a right to require his appearance — 3 Blacs. 129 / 2 D° — 131

Of this writ the kinds are various viz. 3 Blacs. 129

I Ad respondendum This lies when one has cause of action agst. another confined by process of an inferior Ct. to remove the prisoner, so as to charge him with a new action in the Ct. above — 3 Blacs. D° / 2 D° 197 / 2 Mod. 198

II Ad satisfaciendum This lies when Judg. has gone agst. the prisoner and the Plf would keep him safe to shew him with process of Ca. sa. — 3 Blacs. 129

IIII Ad faciendum et recipiendum Which lies when a person confined by a process of an inferior Ct. wishes to remove the action to a Supr. Ct. to be decided. How his body is removed by "Habeas Corpus" the proceedings by "Certiorari" &c usually called "Habeas Corpus cum Causa" — 3 Blacs. 130 / 3 Blacs. D. 15 / 1 Mod. 235 / 3 D° — 148

This kind of Habeas Corpus is demandable of common right, and without any motion it instantly supersedes all proceedings in the Ct. below, and any subsequent proceedings are void as "Coram non Judice" — 2 & 3 Blacs. 15 / Salk. 352 / 12 Mod. 606

It is not granted [illegible] when

when D would obtain a night's lodging or — rather a "Procedendo" is awarded. Q. If a Term sole being sued in an inferior Court and would there remove it. This Case kinds and not in mere law.

3 Bacon. 3
2 Hale 51
Com Dig. 48
Kirby 93
1 Str. 93
3 Coke 44
2 Bac. 238.

IV As to Testificandum. When a party wishes to enhance a Prisoner as a Witness

It was formerly holden that this wrought an escape of a prisoner in Eq. but Sheriffs not so now. When a prisoner is released by a verdict of the Assembly there is no escape

6 Rod. 72

2 Doug. 403

It is never granted to bring up a prisoner to Wales

6 Mod. 176
2 Bac. 238
6 Co Ca. 14
4 Co 6. 202
3 Coke 44

But if the Sheriff or Gaoler in any Case gives the prisoner unnecessary liberty. As to go at large, or goes with in a new circuitous way it is an escape as to Sheriffs

3 Bac. 2. 3

There are some other kinds of Habeas Corpus as re-

V The principal writ of Habeas Corpus is that "ad subjiciendum. directed to the person detaining another in custody. Commanding him to produce and be to do. submit to and receive what-

3 B Com 131

ever the Court or Judge shall award. A Com-

1 Burn 631. mon writ in favour of the liberty of the Subject

3 B Com 131
Rast 92-3

This is the writ by which release is obtained from every kind of illegal Confinement

A person imprisoned by either House of

Parliament for a Contempt cannot be discharged by other process. — 8 Mod. 314

A Writ of Error from B.R. and Ch.J. and by a Citation. (Privilege to bring a Writ of Error from C.B. except that in Case of Commitment for a Crime the Ch. Court only take Bail or remand — Whether it may issue from Ch.J. in the Cation is questionable. It seems not. — Gro Ja. 543-4; Bun 1 550; 2 Vent. 34; 3 Bac. Abr. 631-2; 3 Bacon 3; 2 Mod. 198; 3 Com. 132; 3 Bacon 3; 2 Hale 147

Any of the Judges of B.R. may issue it in Vacation — 3 Bac. Abr. 131; Gro Ja. 543

If a Writ to the Gaoler or other Person detaining to produce the Body with the Cause of his Detention And the Ct. on the Case shall award discharge, admit to Bail, or remand. Habeas prisoner may not be continued under restraint of Liberty without Cause — 3 Bac. Abr. 131; Salk. 3 58; 2 Ray. 580; 6 D. — 678; 3 Bac. Abr. 134; 5 Mod. 22; 14 Vin. 330; 20 D. — 346

The Law having been eased by the Judges in Vac. was passed 32 Charles 2d which was in a great measure and regulates this Writ — 3 Bac. Abr. 135-8; 3 Bac. 7. 6

Since this Statute any of the twelve Judges may issue it in Vacation — Writ for Persons Committed by the King in Council or a Secretary of State &c. — It lies not for Persons committed in Exn or Conviction. and by Stat. 31 Ch. 2d it is ordered in Case of Commitment for Treason Felony and in certain other Cases under Special Circumstances and restrictions — 3 Bac. Abr. 135-6; 3 Bacon 9; 10 Mod. 424; Burg. 142

Writ in favour of Children award Writ &c. — 3 Bac. 135; 3 Hale 5-36

2 Levinz 128
Fitz 182
Burr 666
5 Mod. 21
Burr 687

unreasonably confined by Parents Guardians &c
And the writ may be sued out by the Friends of
the Person confined

3 Bacon 10
Fitz NB. 68.
12 Mod 666

Disobedience to the writ is punished as a
Contempt

Writ of Quo Warranto by Prescription

This writ is that binding the person or persons to appear and shew by what authority they exercise a certain office. It may be had when one person exercises a right belonging to another. As the various franchises in England. such as having a market &c. We have but one case of this kind in Conn. (and but few in U.S.) and that is a right held by a man and his Heirs forever to keep a Public House between Hartford & N. Haven

But it usually issues when Corporations or individuals of it. exercise powers which do not belong to them. As when one claims and of fine which another exercises because he was improperly chosen. Here the individual may have this writ. and he is called the Relator. So when the Corporation exceed the limits of their charter the public may have the writ issuing agt the Corporation in their Corporate name

glotter 28
Yelverton 191
2 Rolle 205
Sug.D 770
Do — 269
2 Ray.d 1556
1 Salk.d 174
1 Shawn 280
2 Burr. 809
Jo Bacons Ab.
Coke Entries
527. 544. 561

Writ of Audita Querela by J. Reeve

This Writ issues where a man has a good reason for not paying an Execution, but has no day in Ct. on which he can make his defence. As if he has satisfied the Judgt. in some way, as by Accord and Satisfaction &c. So if the Exon. is paid off and a pr. capias given which is lost, and no indorsement of the payment on the Exon. and then the creditor, or not that it has ever been paid, and presses the Exon. Now he might have an action on the Case but not however till he has paid the money a second time which might be very inconvenient. He may in such case have an Audita Querela to be stop'd the Exon. — it does more, it dissolves as a discharge of the Exon.

But if he had paid the Debt and cant plead payment, at the Trial he can't have the Writ for then he has had a day in Ct. It is because the party has no day in Ct. that an Audita Querela issues or is granted. So if he might have had a day in Ct. but had no reason to excuse Judgt. this writ will lie.

As if A has a bond agt. B. and B comes and settles it after a Suit is commenced but does not take up the bond it being in the hands of an Attorney. B says "you will take care to stop the proceedings in that Suit" — o yes, says A. then B. must first attorney to take Judgt. agt. B. which he

be used. An Audita Querela is granted in such a case to afford relief agst the Judg.

It may be that Judg[t] has been obtained agst one who by accident has never had notice — As if there are two men of the same name, and the writ was served on the wrong one. He does not appear and Judt is rendered by default agst him. Now he has [illegible] no day in Ct — & cannot get agst Judt. He can do him no harm save an action on the case for his damages. But this is not an adequate remedy. — An Audita Querela will be granted.

And when the practice prevails of confessing Judgts on Awards if Ex[r] were ajourned upon them unfortunately this writ might be had to obtain relief "see Fitz Award"

Mode of obtaining this Writ

In England I have seen many cases and in all of them the application is to the Chief Judge of the Common Pleas. But I suppose that in those cases the Judg was there rendered. From those cases we have (in Conn[t]) adopted the rule to Judge of the Common Pleas in all cases

But I think the application should be to a Judge of that County where the Judg was rendered. This writ is not to be granted of Course it is no "ex debito justitiae" But to any one who did not with his own ex[r] would procure this writ. The Judge has an Ex[r] granted pleasing. The petitioner pro-

ceeds

produced this proof. and if it appears that either is cause the Judge signs the Writ. He cannot ju- dge in a summary proceeding.

The writ is in the nature of an action on the Case. It summons the party cited to appear in Ct. and if the Complaint is well-founded the Defendant recovers damages and the Ex. is discharged.

Bond is always given upon granting an "Au- dita Querela" conditioned that he will prosecute this claim and abide the Judg. and the Audita Que- rela with the Bond is a Complete Supersedeas to the Ex. from the moment it comes into the Offrs hands. The Ct. in general must stop the proceedings however far he may have gone. If he has Com- mitted the Debtor he must discharge him, if he has taken property he must give back. The Ex. is entirely Superseded and destroyed.

If an "Audita querela" is issued without a bond being taken it is said "in Noto" And no Offrs. dare to grant an "Audita querela" until it ap- pears that a bond has been given. as large as the demands on the Ex. It should be large in or- der to cover the Costs. The Offrs can't judge as to the goodness of the Bondsmen.

There is a Similarity between this writ and a writ of Error. The difference, A writ of Error stops the Ex. from proceeding till after Trial of the Error. but it is not a Complete Supersedeas. "Audita Querela" is Again if a writ of Error is commenced and the Ex. is partly executed it can't be stopped. Secus bond.

Bacon. Audita Que rela. ---

Pleas and Pleadings

2.4-

Pleas and Pleadings

James. 67 Gout Esq.

Pleadings are defined to be the mutual allegations betwixt the Plff and Deft in a Suit put into legal form and set down in writing 2 Bac 393 / Do — 398 / 1 Cohe 132

Anciently in England all Pleadings were oral. The Counsel delivered in his Plea "Viva voce" and then it was reduced to writing by the Clerk of the Court. Hence they are frequently called in Norman French Plaus. Thus it is spoken of Plaus & demurring.

In Great Britain from the time of Wm the Conqueror, until the 36th of Edward 3. Pleadings were in Norman French which is prop. called the language of the Law. From this time to the 4th of Geo 2d they were in Latin* and by a Statute of that year they were ordered to English in which language they have ever since continued

4 Bacon 1 / 3 Bac 317 / Do to 3 B.t. Laws 23 / Do — 24.

* excepting the Commonwealth they were in English.

The English Reports tell the time of Charles 2d were in Norman French because the Pleadings were in that Language. tho' the greater part of them are now translated

All Pleadings in Civil actions in England and in this Country are required to be put into writing

In strictness the Pleadings is nothing more that telling forth upon the record such facts as constitute the ground of the Plffs demand

or

3 Wils. Rep. 159 Doug. 248 or Claim on one hand or of the Defts defence on the other. This is the precise definition of Pleading

L. Mansfield has observed that the Substantial rules of Pleading are founded in the strongest sense and in the soundest and closest Logick. and "Littleton" that it is the most honorable part of the profession The great object of Pleading is to fairly state the Claim of the Plff and the defence of the Deft in such a manner as will most conveniently admit of an easy and unbiassed Issue. so as to bring the Claim and defence on both sides to some precise definite Point. Without a System of rules in Pleading there would be no uniformity in the administration of Justice

1 Burr 319. 1 Burr 319.

Pleading is strictly a Syllogistic Process. Every good Declaration and every good Plea contains the elements of a good Syllogism A Declaration is not a Syllogism in form but it is in substance one. Thus to exemplify the proposition Salkeld there is a mandamus in Hilary Term "quare Clausum fregit" The Plff is the Pleader The Syllogism is this "Major Proposition" - ags. him who has forcibly entered upon my Land I have a right by Law to recover damages "Minor Proposition" The Deft has forcibly entered upon my Land. "Conclusion" therefore ags. him I have a right by Law to recover damages The "Major" proposition con-

contains the legal principle on which the Deft founds his claim. The "minor" contains the facts to which the legal principle is to be applied in the present instance case. The "Conclusion" is an inference of Law from the application of the principle to the matter of fact stated. These propositions then must all be capable of being denied. The Deft is at liberty to deny the legal principle. The facts contained in the minor proposition and the Conclusion. The rules of Law have settled how they are to be denied. The first is to be denied regularly by an issue in Law called a Demurrer.

The operation of a Demurrer is to admit the matter of fact so far as it is properly stated, but to deny the sufficiency of it in Law in favour of the Pleader. The "Minor" proposition is denied by an issue in fact which may be either a general or a special issue. If both propositions are admitted, or not denied (and this amounts to an admission) the Conclusion can no otherwise be answered than by alleging new matter. and this must be done by a special plea in bar. He cannot traverse the Conclusion. He may deny it by a special plea in bar as a release eg.

The plea of a release presupposes the "major" and "minor" propositions to be correct but avoids the Conclusion by something new. This plea also contains the elements of a good Syllogism.

H.

It is as follows. viz. If the plea should be found against the Defendant, he must suffer judgment to be entered against him, and the Plaintiff will be entitled to his damages, but if the Plaintiff has replied a release, and the Defendant has rejoined, that the release was obtained by fraud, the Plaintiff must prove the fraud, before he can recover damages, for the Defendant has a right to suppose that the release is valid, and binding upon the Plaintiff, unless he can prove the fraud.

This view of the subject will enable us to understand the nature of the Plaintiff's Declaration, and the Defendant's Plea, and the Plaintiff's Replication.

1st The Writ

The first stage in a suit is the Writ. This is a mandatory letter directed to the Sheriff, and issued by proper authority to command the appearance of the Defendant.

3 Bl Com 273
Cowper 454
7 & 8 Wm 3 c. 4
Cas. Pr. 233.
2 Wms 947

The suit is regularly and formally commenced from the issuing of the Writ, but in Equity it is not commenced until the filing of the bill, because the Bill in this Court is analogous to a Writ in Law. Hence it is considered the original commencement of a suit.

3 Bac Abr 41
2 Burr 960.

* as this is after the Statute of Limitations, the Statute is no bar, unless the Statute is specially pleaded, and therefore the bill is considered the original Writ. Cowper 454

In Courts of Law the Declaration and Writ issue to-

together. In Strictness the Writ is the foundation of the Suit here as well as in England. But the first Stage of the Suit here is as mutch the Declaration as the Writ. The Suit is not considered here as Commenced to all intents and purposes untill Service has been served upon the Defdt. for it has been ruled by our Supreme Ct. upon a Plea of Tender 4 Rob. 480
when the Writ issued, and no Service made, before Tender, that it was good tho' he did not tender the Costs

* For in many purposes however the Suit is Commenced from the issuing of the Writ. Because the Cause of action must exist at the date of the Writ 4 Bac. Ab. 401
as if a Writ issue today upon a bond due tomorrow Cro. Eliz. 577
and not Served till the next day. the Defdt 5 Coke 48
cannot recover 3 Burr. 1423
Salk. 89
Cas. Pa. 452

2da Declaration or Count.

The first Stage of the Pleadings is the Declaration or Count. This Contains a Statement of the grounds upon which the Plff founds his Recovery 12 Laws 73.

The Writ is not a part of the Pleadings. * All 1 Inst. 17a
the Statement it Contains is made by the Count. Then 4 Rawle 84
is there no material allegations or alternations. 3 Ld. Raym. 293

* A Count Consists of allegations by the Plff. which are made on oath, either upon the Oath of the Plff. himself in the name of the President of U.S. in U.S. Ct. in Law in the name of the Sovereign in Court in the authority of the State and in England in the name of the King.

The word Declaration and Count have been used as Synonymous. But a distinction has lately obtained. If there are two or more Counts or distinct Statements in the Cause. each distinct Statement is called a Count. and they altogether the Declaration

yet

yet when there is but one Count they are Synonymous.

The Count or Declaration is but an explification or exposition of the original writ. The Writ itself must name the Cause of the Suit and the parties but it states it very briefly It does not state the Material facts out of which the Cause arises these are reserved for the Declaration.

3 Bac 293
4 Bac 8
3 Com 18.

Note 1

We have no Comon with Bs called an "ac etiam" in Cont. This is a Clause inserted in the Bill in B R for the purpose of giving that Court jurisdiction over matters purely Civil. This Ct had original jurisdiction of no other Civil Causes except Writs for which a fine is due to the King. But when the Deft is once in the Custody of the Marshal of the Ct he may be charged with any personal Civil Action whatsoever. Of real actions they had no Cognizance in this way. The Writ then may contain a Clause charging him with a Bond &c (eg Trespass and then "ac etiam" with Debt also. The first Cause of action gives the Ct jurisdiction over the person and then the "ac etiam" enables the Plff to declare agst him in the personal Civil Suit

The pleadings include the Count in the largest sense of the term. In the limited sense of the term they embrace those allegations only which the Count and the Deft makes by way of defence to the action

7 Bac 1.0.8.
3 Bac 299.

and

and those which the Pff makes to satisfy the Dec
laration.

The first stage of the Pleadings then in
the limited sense of the word is the Defts plea 3 Bl Com 301
The pleas on the Defts part are divided into two kinds viz
1st Dilatory Pleas. 2nd Pleas to the action

1st Of Dilatory Pleas.

These are such as tend to delay the Suit by ques-
tioning the mode in which the remedy is sought 3 Bl Com 301
rather than by questioning the cause of the action
itself.

This first class of the Defts pleas admit
of a subdivision. According to Blackstone they
are of three kinds viz 1st Pleas to Jurisdiction.
2nd Pleas to the disability of the Pff. 3rd Pleas in
Abatement The two last tho' new compounded
are as distinct as any other pleas. These three class-
es comprehend the whole of Dilatory pleas,
a different division is made by other writers.
The propriety of this division is questioned by Lawes.
for it has even one immaterial as they embrace all
descriptions of dilatory pleas

Pleas to the disability are often called pleas in abate
ment & so are pleas to the jurisdiction sometimes. Abate-
ment has been considered a generical term inclu-
ding all dilatory pleas tho' severally. but unfrequently. The
form of this is distinct from either of the others.
The object and effect are different from either of the others
therefore it is illogical and improper to call a plea to
the 5 Bac 35

the Jurisdiction or disability of the Defft a Plea in Abatement,

2dly Plea of the second kind and
2dly Pleas to the Action, A Plea to the declaration is an answer to the merits of the Pltffs Complaint and denies the Cause of Action. Itself

A Plea to the action may deny the Pltffs right of recovery in three ways, viz. 1st By denying the Pltffs allegations 2nd By confessing and avoiding them, or 3rd By matter of estoppel. This denies the Pltffs right to make the averments.

This is generally considered a mere avoidance of the Pltffs allegations; but it is not strictly so,

Three pleas are of two kinds 1st The Gen.l Issue when the allegations are denied. 2nd By a Special Plea in Bar. which then is matter of avoidance. — or — Estoppel by a plea in bar to be sued but not by matter of avoidance

3 T Rep 303
do — 305-D
Laws, 377-8
(25) 115-30-40
* Find, whether this estoppel would be a matter of avoidance or not.

There is another mode of denying the Pltffs right of recovery tho he cannot use another Plea the way in which he may do it is by Demurrer. This is not in strictness strictly a Plea tho' it is sometimes called one. It is not a Plea, for it denies no matter of fact nor alledges any new matter.* It only says "I am not bound to plead" The form also shews this. According to the form in England the Deft a Tenant saying the Pltffs Declaration is insufficient proceeds to say "for want of

* i.e. within an exception to the general rule —

such

such sufficient matter the Deft is not bound to make any answer thereto" - This I think strictly a proper view of a Demurrer. This has been called however with a plea to the action for admitting it to be a plea. It is not a plea to the action for a Demurrer may be taken as well to any other part of the pleadings as to the Declaration A Demurrer then is a mode of denying the Pltfs right of recovery, but not a mode of denial by plea.

4 Bac. Abr. 129 (a)
1 Saund. 72 (a)
5 Mod. 132.

This [illegible] of the general view of the mode of pleading.

I shall now proceed to the general rules relating to Pleadings in general.

In all pleadings two things are necessary The first and most important is that the Statement of the plea be sufficient or in other words that matter alledged must be sufficient & 1st. and secondly that this matter be stated recited and expressed according to the forms of Law. If either of these is omitted the pleadings are bad. If the former it is bad in substance. If the latter it is bad in form.

Hob. 104
Gwilym 883
Laws 45

There are different ways of taking advantage of these omissions. They are both good ground of Demurrer omitting the first is good cause of general Demurrer - the last of Special Demurrer.

In all pleadings it is necessary to state facts only, and as often as may be Conclusions from facts but it is never necessary to state conclusions of Law

And

Gen. particular Laws and Customs are pleaded when the Ct cannot "ex officio" take notice of them. but the Gen. rule extends to the Gen. Law Customs also which are pleaded as mere exceptions to the Gen. rule. The conclusion from a fact is a conclusion drawn on fact stated in the Declaration. It is not then a substantive independant act of itself. for it is inferred from a fact expressed in the Declaration. This is "Conclusio facti de facto." Note 2d.

5 Rep. 70
Doug. 159
Laws 40

Another genral rule in all pleadings is that every fact should be direct not argumentative nor by way of recital. The argument of every thing material must be positive and this genral rule requires one thing. that things immaterial need not be directly stated. as mere matter of inducement

4 Bac. 22
Laws. 75-6
D. 131-2-4.
Hawkins 128
2 Roll. — 73
Cro Car. 383
1 Saund. 274
note — 1

But no fact however important it may be need be stated by way of direct positive averment if it cannot be directly traversed. for the rule of pleading. By the rule last mentioned is meant that the party pleading should state the principal fact itself direct and in positive terms. not the grounds from which he wants to infer the principal facts. This he cannot do under a "Whereas." but must aver it directly and precisely. Thus if it in an Assault and battery should relate as. "That whereas he"

Hawkins 128
Just. 203
7 Rep. 458.
Laws 74-5
D. 131-2-4
4 Bac. 97.

* it is sometimes sufficient —

it would be ill. for the Gen. Issue would be absurd "whereas he did not &c and Verdict cannot find this

30 —

of fact it is substantial This is stating the material thing indirectly.

But it has been holden, and seems now established that an averment allowing the words "quia" "licet" "pro eo quod" are severally sufficient notwithstanding the rule above laid down * 1 Saund 117 n 4 / 1 Levinz 194 / 2 Lev 47. 69 / 2 Vent 26 2 28 / * Note 3d

According to this rule then it is apparent that it is not sufficient for the party pleading to state the mere evidence of the principal fact to be established.* This amounts to nothing better than argumentative pleading Thus in Indebitatus assumpsit the Plt should state that the Deft became indebted & became liable to pay him: the declaration would be insufficient because the indebtedness of the Deft and consequent liability are the mere evidence of the implied promise. The indebtedness of the Deft and consequent liability is all that is necessary for the Plt to prove, consequently they are the evidence of the promise. So also in a Note of hand he only describes the instrument which is merely the evidence of the promise. This declaration is bad, and has been so holden by our Cts on a writ of Error.

* This rule has often been done what related as to the Supra

Bul page 50-7 / (1) " 343 / (2) " 325

So in Grove if no conversion (which is the gist of the action) is alledged the Declaration would be bad, for demand and refusal are only evidence of a conversion: they are not the conversion itself.

Suppose one states in his Declaration that A made & executed unto the Deft a cer-

promis-

6 vs Sa. 383
2 Robt 75
15 Mass 274
vid —

promised to pay the Pltf at such a time. Such a Sum of money. This is evidently bad. but not now to shew the other exceptions of Plaintiff's for the cause of action should be stated. what is the evidence of the promise.

2 Bac Ab 72, 73
1 Salk 363.
Holcot 234
Plowden 282
Laws 52.
Salk 185

Another Genl rule in all pleadings is that each party admits as much of his adversary's allegations as he does not deny. Having a right to deny if he does not he impliedly admits them. This rule holds thro all the pleadings. Each party pleads to the Declaration until the Issue is joined. The three two Constructions when he first, when a Jolea on in favour and the other against the party pleading that Construction which results against him is to be adopted. Since it is presumed that such party will make the most of his case. Cases if it were otherwise Chicanery would prevail to prevent the Course of Justice. This rule holds in all analogous Cases as in written Contracts.

Gilb Pla 70
Ld 83 4
Laws 67-8
Bl Com 384-5
Comb 395
Amendment 361

Another Genl rule is that in pleading traversable facts it is in Genl necessary for the party pleading them to allege the time and place. Some time must always be stated yet he is not bound to prove a time except when otherwise it would work a variance. # A place must be laid for sake of a venue. So in transitory actions some place must be stated because according to the strict rule of the Co. the action must be tried in the same the time it that Deft may more easily prepare for his defence. The

The reason why time is material in stating on the record is because the record must ascertain the identity of the thing demanded in the Pltf's Demand and that such time may be made to appear to be the same

the very County in which the action arose. This rule of the C.L. is varied from by fiction and convenience. supra
This is however never found. Were it strictly held to no Contract written or bond executed abroad could be sued in this County. In England they evade the rule in this way. If a bond given in N York Laws 57-8
be sued upon in England they state New York to be in the U.S. &c. and in the Parish of St Mary Le Bow in the Ward of Cheap" and this fact is not traversable.

In actions brot to recover personal Chattels upon injuries done to them it is a general rule that it must say that the number quantity and price of them should be stated. But it is never necessary to state the truth in these particulars except where a mistake in either of them would work a variance. As in Trespass he must state that the Deft took a certain number of horses and if he can prove he has taken but one he will recover.

These are regularly but matters of form except where a variance would be made. Thus if the Plff should declare that the Deft made a promissory Note in which he bound himself to pay 100£ when in fact he bound himself to pay only 90£ this mistake would be fatal. The terms of a Contract must be stated Laws 49
ted exactly as they are proved. In Torts there is no matter of variance.

It is.

2 East 333. Laws 420 3 D° 170 Co Ja 544 1 Salk 363. 6 Mod 288 4 Mod 42.

It is also a Gen° rule that superfluous does not vitiate the Pleadings. "Utile per inutile non vitiatur" is a maxim of the Law, but Repugnancy in any material point will vitiate any Plea

By superfluous is meant matter wholly impertinent, or in other words it is where a party having alledged sufficient for his Case proceeds to allege further something foreign to his Plea. Now if the Parties state things neither good nor bad, they cannot injure the Plea

Repugnancy is a self contradiction in the Pleader, and consists of two or more averments of the Parties being inconsistent with each other.

4 Bac Abr 100 1 Salk 193 200 Com Dig 599 Dang 642 Co Litt 258 6 16 Rep 44 6 1 Roll Rep 346 1 Roll Abr 547

It is said in our Books that every thing must be pleaded according to its legal signification and not as the Case may be the Court must take notice of such. I have not for Gould this rule was wrongly expressed and have found an authority in support of my opinion. Thus it is said that if one Joint Tenant releases another this must be pleaded as a release and not a Release and Joint Tenant cannot release another. So if a Grant is made by a Tenant for Life to the Reversioner this must be pleaded as a Surrender because it cannot inure as a Grant. So if one shall Covenant never to sue his Debtor the Party must plead this as a release and

ad

or discharged not as a Covenant Now all these things may be thus pleaded and it is the most proper way but it is not absolutely necessary that it should be so pleaded. As in the case of the Joint Tenant the Law considers the Instrument as a Release Consequently the evidence of a Instrument will support the Averment of a release. Might not therefore the Instrument be pleaded as a Instrument? Cannot the Court discover it when on the record as well as they can when off the record?

In 2 Bl Blackstone 11 the rule is laid down it ought to be by Justice Wilmot it may be pleaded as a strict matter of fact or according to its legal denomination 2 H Bl 11 Whitemans case Hup 9

That a fact appear on the record need not be averred. This is another Gen Rule. However material the fact may be if it appear on the record the Pleader need not aver it. * 16 1 Salk 363-8 9 Coke 5-4 aud 6 7 Coke 40 11 Coke 92 a 2 Rast 247 4 Bac Ab 2 a 2 Mod Rep 77.

As if the fact appears by the other parties own shewing. It is entirely useless to plead except for the purpose of shewing some fact which does not appear. And all necessary circumstances implied in the facts stated need not be specifically alleged. If the averment of one fact implies the existence of another the latter need not be averred if it only furnishes evidence of another fact this latter if material ought to be specifically alleged. Thus in pleading a Instrument it is not necessary to aver that livery of seisin was given upon the Instrument

* Thus in declaring on a Bill whose Date is necessary to shew that the Plaintiff now sues within 6 Years Bank it is not necessary to state it within the time for it appears evidently on its own face to be within 6 years

page 35.50-7
D° —— 325

for

for the word "postponed" & "determined" in his livery of seisin. There are some opinions gone that this would be ill on demurrer. and it must only be urged

Whatever is admitted between the parties in the pleadings cannot afterwards be contradicted. Even the Verdict of a Jury cannot contradict it. Neither of the parties can insist upon what he has pleaded tho' the Ct in its discretion may allow the party to amend an error in his plea. The province of a Jury is to find only those facts which are averred on one side and disputed on the other, or in other words those facts about which the parties dispute

Laws. 48
1 Burr 303.

2 Bl Rep 1189
4 Burr 2
Laws 48

Note. 4th

Note. 5th

4th It is a general rule that each party is bound to prove no other than material averments. This is not however universal. The Plaintiff is bound in some cases to prove averments which are immaterial. This however he is required to do only in those cases in which proving the case differently would work a variance. i.e. when the immaterial averments go into the description of the ground of action or matter of defence. the party is bound to prove the averments as stated altho' many of them are immaterial.

5th The rule is now restrained to pleas of deeds and written Contracts. If in pleading a record or written Contract the pleader will state any immaterial thing, as a part of the

Burton & Right
in
Doug 640
2 Bl Rep 1164
2 East 446

cause

cause of action or ground of defence and he can't prove the immaterial facts as stated his declaration or plea must fail. 2 East 497

You will send two cases decided as to the time Ld Mansfield's time in which the returns is laid down not confined to records or written contracts but in a note to the last of these cases the rule is restrained as laid down above 2 Saund 48, 5 Taunt Rep 343 Bls N.P. 5 2 Mc Nally 501 Do - 513 3 T.R. 446

The the rule is as above it is never required of him to prove immaterial allegations (i.e.) such as are foreign to the subject of pleading As if the Deft should plead that the Deft entered into a Bond, and at the same time he was in white hall, the latter is an immaterial averment and he is not bound to prove it.

If the Declaration or plea or any other pleading on either part wants mere form or omits the circumstance of time &c can be it is equally aided by the second party's pleading even instead of demurring (i.e.) if he neglects to do so and pleads over he cannot take advantage of the defect afterwards, for when the pleading is faulty in no other respect than this advantage can be taken of it only by Special demurrer

Thus if the fault be in Nihility, the Deft pleads the Gen. Issue the Deft cannot take advantage of the nihility. So where there is a party who pleads a release or Award and omits to take a profit of it, still if the second party pleads over in- * 4 Bac. 2a 7 Coke 25a 8 Coke 120. 1 Saund 363 Cas Ba 84 Salk 519.

2 Vent 222 instead of demurring the fault is aided
Indeed it is a Gen Rule that a defect merely formal
is aided by the Party's Pleading ever
The principle on which this depends is
that of a waiver. If in such Case the adverse
Party does not take advantage of the defect
in Pleading pointed out by Law, he waives
all the advantage he might have taken to
the informality.
If the Pleading on one side is even so
materially defective (i.e.) omit material facts
still if the other Party avers himself, this ma-
terial fact omitted by his adverse Party, the
Pleadings will be aided. Thus if the Plea in
Bar avers a material fact omitted in the
Declaration, the Declaration is aided by it
So if the Replication avers a material fact
omitted in the Plea in Bar the Plea in Bar
will be good for in this Case there will appear
upon the whole record a Cause of action when
the defect is in the Declaration. And altho'
it does not appear in the proper place, or is
page 78. pleaded by the proper Rules still the defect
is cured Thus the Plff charges the Deft with
carrying away "quendam lapidem" not stating
5 Bac 197 he had even the profession of it or the right of
10 Bac Ab 184- Property in it The Deft in his Plea in Bar
2nd Digest admits he took the Stock that Property of the Plff
Plead 85 and then pleads to justify it This Cured the
Do 87

(2) De-

Declaration which ought otherwise have been had
or Demurred

But with substantial defects no party
can aid his adversary by relying upon instead of
demurring. They cannot be cured in any manner.

Any new matter alleged in any other
stage of the pleadings after the Declaration
must conclude with a "verification". * The form of
a "verification" is this "and this he is ready to ver-
ify &c" The reason why this must be done is
that a verification is the established mode and
form of leaving the pleadings open to further re-
joinder so you will observe from what has been said
that the Deft at Law has three ways of meeting
new matter: first by denying it. Secondly by con-
fessing and avoiding it. and thirdly by demurring
to it. But if the party has closed the pleadings
the new matter cannot be denied. which
would be contrary to the rules of pleading. be-
cause when the party advances new matter he
cannot make an issue. and cannot tho other party
to join him in it. It is true the verification
is the established form. yet it is a thing absolutely
necessary. that the party may meet the allega-
tions of his adversary in the words

An Estate in "Fee simple" may be pleaded
or alleged generally. the party is not bound to shew
the Commencement of his estate. But in pleading
any Qualified Estate the Pleader must shew
the.

Authors
subject
page 78
Note. O

* There is an ex-
ception to this rule
introduced by Stat
5 Geo 2d in Cases
of Ejectment when
the party at the
Assizes refuses to
comply with the
Courts
nothing to do—
It is an anomaly
and it ought to
be a Declaration
monstrous! 1 Gwill
See
Lawes 115-45
Do 224-27

1 Saund 103-4
3 Bac 306
Do — 310
Doug 658,
Carth 575
2 Burr 772
Lawes 144-8
Do 150. 158
3 Bl. 309-10

the Commencement of it. i.e he must plead it Specially. I have found a reason for this in one Book but (viz 3 Wilson 72) it is there said a Fine may be avoided by acts of ownership or long possession or even by downright wrong, but the Party ought not to plead his own wrong to shew his Title; of Course the Jury are Competent Judges of the mode in which the Estate was created: but they are not Competent Judges of a limitation or any other particular Estate, for the Ct is to judge of the matter of Law raised out of the particular manner of the Conveyance of the Estate

2 Ray 338
Lawes. 47.

I have anticipated the rule that in every stage of the pleadings each Party may meet the allegations of his adversary in one of three ways, viz

1st By denying them and pleading the general Issue

2nd By confessing and avoiding them by some new matter and 3d By demurring to them

B.R. Dom. 309-10
Lawes 148-9
D° 150-8

This may be done till all the pleadings till one Joinder in Issue is tendered, and then the other has it is bound to join in the Issue. He has no Longer an election. If then the Deft pleads in bar the Plff may deny the fact stated thereon or he may Confess and avoid it or he may demur to it. He can plead new matter then must Conclude with an averment, and not to the Country. The pleadings are in the following order. The first plea is in the Deft

and

and is called the Declaration. 2nd The 2d of the
above is called a Special Plea in Bar 3rd The Repli-
cation of the Plff 4th The Rejoinder of the Defft
5th The Surrejoinder of the Plff. 6th The Rebutter
of the Defft and 7th The Surrebutter of the Plff.

No Chain of Special Pleadings can be carried
further than a Surrebutter. Why in the nature
of things it cannot be done is not evident

One thing material is to be observed re-
specting the Succession of Pleadings. In every
successive stage of the Pleadings the Pleaders on
each side must support what he has before
alledged in his own favour. The Plea in Bar is
to destroy the Declaration. The Replication of the
the replication is to answer the Plea in Bar as
to fortify the Declaration, and so on thro all the
Pleadings. and if this is not the Case the Party
pleading is guilty of a Variance or departure in
Pleading; see Stephens.

3 Bacon 310
4 Bac. 6
1 Salk. 364
Plowden, 76
2 Ray 1499
5 Comyns 99
Do — 123

In Concluding this general rule I
would observe that the Judgt given by the Court is
always entered upon the whole record so that he who
upon the face of the whole record taken together
is found entitled to Judgt will have it. And the rule is
the Ct are to give Judgt upon the first substantial
defect in the Pleadings. Thus if the Declaration
should be bad, and the Plea in Bar bad, and the
Plff should demur to the Plea in Bar as bad
the Ct would look back to the first defect, and

they

they would find it in the Declaration. The bad plea in bar is good enough for a bad declaration for the Deft. need not have made any answer to the Declaration. Suppose the Declaration good the plea in bar bad. and the replication bad. and then the Deft demurs. here the first error is in the plea in bar. therefore Judgt must be rendred for the Plff. because a bad replication is good enough for a bad plea in bar. This rule may be applied thro all the succeeding stages of the Pleadings.

Hob. 199.0
Do 54 a 56
8 Coke 120 b
Do — 133 b
9 Coke 110
Salk. 173
4 Bac. 7
Do — 131

Here are all the genral rules I have to lay down. It now becomes necessary to attend to the several branches of pleading in their order.

The Declaration

The first I am to speak of is the Declaration which is the first stage in the Pleadings. The Declaration must shew all that is necessary or special to the Plffs right of action. This is the most genral rule. The Declaration contains the whole foundation of the Plffs claim. Now unless the claim is stated in the Declaration it cannot be enforced. Indeed it is said to be a reason for this rule that the Plff cannot prove any matter not alleged. This is not a reason but a thing which is rather a consequence of the rule. The reason is that Plff cannot recover unless he shews a right of money. The evidence of this right is contained only in the Declaration. The Plff cant prove a

1 Saund 49 a
Lawson 84
Hob. 199.
Lawes 68.
4 Bac. 4 a 6
Do — 13

a good right of action under a bad declaration.

And as on the other hand the Pltff cannot recover unless the Declaration shews all that is essential to his right of recovery. So neither if the Declaration being otherwise sufficient discovers any fact which shews he has not a right of recovery, he cannot "in fact and" recover. For the same reason also if the declaration discloses any facts which shew that at the Commencement of the Suit the right of action was not consummated he cant recover.

Thus if the Pltff should declare on a Bond today and in his Declaration shd shew that the Bond was not due till tomorrow he Cant not recover upon it. Since his cause of action must exist at the date of the Writ. And the Declaration is so radically defective that it cant be cured in any manner.

Yet it is very improper to say the Writ abates in such case, for that is an appropriate term applying particularly to another part of the Pleadings.

The rule mentioned above admits of an exception. The rule is no man can recover in an action on a Contract before the time of performing the Contract has elapsed. The exception is this viz. When one party is bound to perform a Contract in future and disables himself to perform it before the time of performance arrives he may be sued immediately after the act

Co Eliz 325
Co La 574
Cas in 554
Doug 1 01
7 Term Rep 4
2 Saund 347
7 Coke 24-5
Rawson 84

Note 7

act of disability. Thus if A covenants to convey Land to B within 6 months and at the end of one month conveys the Premises Land to a third person for a year or in fee he may be sued before the 6 months have expired. He may be sued repurchase them again before the 6 months have expired but this is not to be presumed.

So if a Lessee for years covenants that he will at the end of his term leave the timber fixed standing and this is the first time of performance of the covenant. And if he cuts them down before the end of the term he may be sued immediately

5 Coke 20 D. — 21.

The omission in the Declaration of any thing which is the first ground or substance of the Action is an incurable defect.

The first of the action is the substance of the Claim. the offence of the right to recover it or Debt without which there is no Cause of Action.* And the Declaration may omit the first of the action without omitting any material fact

* The part of the Action is not mispleaded by omitting some Single fact. When the right of recovery is founded on a number of agreements connected in the nature of their one of the first of the Action &c.

A will be entitled to a right of recovery against B by doing Incident act himself. A performance can be sued without averring performance in fact. Here is no Cause of Action. for tho he has stated some material facts. viz a Contract and that he has never been paid, but that the material fact of performance is omitted and that is sufficient to destroy the Declaration for

Again what the principles of the Com Law if a Dog has done an injury to another person formerly, the owner is liable if he knew beforehand that the Dog was addicted to this species of mischief. Suppose then the action is brot agst the owner of the Dog stating every thing except the "Scienter" there is no Cause of action. It make real fact which is the gist of the action is omitted and this is enough

And in Case of such an omission as this the defect is incurable. The Deft may demur and it will be sufficient, or if he pleads to issue and then is a verdict for the Plff he may move in arrest of Judgt or have it vacated on a writ of Error. A defect going to the Gist of the action is incurable. A verdict will not cure it

5 Mod 395
4 Bac. 8,
3 Bac Ab 395
Doug. 658,
4 Wms 472
2 W Bl 901

Matter of inducement and matter of aggravation are not the Gist of the action. A Declaration may consist of inducement aggravation and substance.

The inducement consists of such subject matter as is merely introduced to the principle fact or Cause of action, and is always inserted for the purpose of elucidating and explaining how the Cause of action arose*

Matter of aggravation is that which goes to shew with what enormity or in what circumstances of outrage or hardship the wrong complained of was committed.*

Cowp 60-9
Do ——— 70.

* Matter of inducement—general terms or words of Law are sufficient and it is not necessary to state any thing but the gravamen of the complaint

* Matter of aggravation proper to be stated in the declaration

There are rules applying to these matters which will be given hereafter. But it would seem observe that in laying inducement and matter of aggravation the Law does not require the same strictness in form, nor the same certainty in description, as in stating the Cause or ground of action

In all Actions the Declaration must contain what is called "Certainty". This certainty is as to parties - time - place and subject-matter. Also these particulars must be so stated as to be intelligible, that the party may adapt his defence to the real claim of the Pff

4 Bac Ab 83
Lawes 527
Plowden 84
Do — 122
1 Inst 303a
Co Eliz 78
5 Co Rep 352.
4th Indecimum omnium
that the Pff may be able to punish the Def for any subsequent contempt for the same Cause

This Certainty relates chiefly to the manner of making averments and the meaning is that the allegations should not be loose vague and argumentative for three reasons. 1st That the Defft may know how and what to answer. 2nd That a regular issue may be formed or joined and 3rd That the Ct may know how to render Judgt

And it has been decided that the words "said" "aforesaid" &c do not import sufficient certainty, when there are two antecedent subjects to which they are referable, for these words are words of reference. Thus if two Counties have been named and the Pleader proceeds to say "the said County" or "the County aforesaid" this would be uncertain. This should be true of the subject matter and parties also. Thus in an Indict-

ment

Indictment in which J S was indicted for Bur-
glary and in the recital part of the declaration 2 East 64 a 6
another J S was named. and then the declaration 2 Ld Ray 888.
proceeds to state that the said or aforesaid J S &c 8 Rep. 178
this was holden to be uncertain. You might
say in the first or last mentioned County, aforesaid.
said. At any rate you must use a word of
more particularity.

But tho' the Declaration contain certain 5 Bac 272
ty the rules are not now near so strict, as formerly 8 Coke 34
by. As to the subject matter the rule with 6 Co Rep 17
respect to a description of it was very strict Salk. 0 2 80
but the decisions have not been uniform
and many cases are irreconcilable

In certain kinds of actions greater certain-
ty is required than in others. As in real ac-
tions and according to the old rule pleas. 11 Coke 55
ings also greater certainty is required than in Do 552
injuries to personal Chattels. and the reason Salk 2 54
given is that the Sheriff may know from the 3 Wilson 23
face of the Declaration itself without any ex- 7 Bac. 630
trinsic proof. what Lands are the subject of the
suit. or what of which he is to give possession

So in "Detinue" more certainty is required 3 Levinz 303
than in actions for damages done to personal Property. 12 Mod 3

And as to the last instance where damages
are recovered for injuries to personal Chattels
the rule is "if the description of the thing be 12 Mod 3
suit

2 Rug. 869
Wilson 70
Cited 289
2 Saunders 74 n 6
Hob. 116
2 Rug. 1015
7 Bur 529

4 Bac. 2455.
2 Rug. 738
Wilson 70.
Forbes 377.

Its impossible to lay down any specific rule as to the degree of certainty required in this action &c. —

1 Vent. 15. 114.
3 Wilson 292
2 Keb. 292
2 Keb. 555
5 Bac. 372.
2 Saunders 343
Co. Ent. 808
Cited 35

such that the Jury can understand according to the Common acceptation of Language what is meant by the description it is sufficiently certain

In Replevin the rule is laxt & not thus in Detinue. In the Case of Ejectment the rule is greatly relaxed.

When the kind of Personal Chattel is not specified the Declaration wants certainty.

According to the Current of modern Authorities if the want of certainty in the description of Personal Chattels in an action for the recovery of damages for injuries done to them goes only to the number quantity or quality and not to the very nature or kind the defect is aided by Verdict

Thus a "yard of thread" a "library of Books" and "old Iron" are good and sufficient descriptions of the subject in an action of Trover. And where the thing to be described is mere matter of aggravation much less certainty is required than in things which go to the gist of the action. Indeed any good & reasonable description in the Count is not objectionable in point of form.

"Plates" Case in 5 Coke 54 then Case not to be Law. and so the Case in 2 Lord Ray 1410 Case not to be Law

The reason why certainty is required is said to be that a writ is so the Deft cannot plead it in Bar to another action for the same Cause.

This

This is not the true reason. For it can be pleaded in bar. The reason is stated by Ld Mansfield to be this - that the Deft cannot otherwise justify, or in other words it is to enable the Deft to answer with certainty the precise thing for which he is sued. so that he may know how to apply his answer to the Plffs claim

4 Burr 2450
Do 2456

The Law never requires any greater certainty in the description than the thing will admit of.

4 Burr 1963
Pleas 135.

If a Declaration contains several subject matters some of which are sufficiently and some not sufficiently described. the Declaration will be good as to those things which are described with sufficient certainty and for them the Plff may have Judgt or in other words a Declaration may be good in part and bad in part for want of certainty. Thus in Trover & Conv. A declares that B took away such and such articles describing them exactly and also "divers others" Now all the articles described are good but divers others is altogether uncertain and the Plff cannot have Judgt for them. The Deft cannot answer to the Declaration. If indeed the Jury give a general verdict and entire damages the Plff cannot have Judgt for the D^t cannot know for what amount to render Judgt. The Jury then ought to sever the damages if they choose to give any thing for the sufficient part, and then the Plff can release the insufficient part and have Judgt for the other

1 Lord Raym 386 & 7
Laws 86
1 Salk 218.
2 Burr 1079
Comyns
Pleader C
32

Thus

When there is a defect in the Declaration advantage cannot regularly be taken of it by a plea in abatement. It is not the office of a plea in abatement to attack the Pleadings & reaches the Writ or Bill.

Yet the plea in Abatement may be found to be a defect in the Declaration. As if there is a misnomer in the Declaration or a variance between the Writ and Declaration. Here there must be a plea in abatement for there can be no Demurrer yet the office of a plea in Abatement is to destroy the Writ.

A misnomer is the proper mode of attacking an insufficient Declaration. This when the Declaration is the subject of a general Demurrer and if judgt may be moved against him.

In all cases where the Com. Law requires a Contract to be written it is necessary in declaring upon that Contract to aver that it is in writing. Thus if an action is to be brot upon a Contract of Apprenticeship the Pl. must declare that the Contract is by Deed - for the Com. Law requires that this Contract should be by Deed.

So in the case of a release this must be averred to be in writing. So if a Contract not known to the Com. Law but created by Stat. is required by the Stat. to be in writing it must be declared upon as in writing. As in the Case of a Devise of Land. This is unknown to the Common

The mere obscure misnomer in the Declaration is not a defect to be pleaded or assigned specially as a cause of demurrer. It is sufficient to shew it in evidence. But to shew it in proper manner a plea in abatement is necessary. And can be pleaded by a Common Law

(Ld Raym 8.
Salk 212
Do - 220.
Willis 478
Lawes 172

or Feudal Law. There was no such thing as a testamentary disposition of Real Property at C. Law

The Stat. of Henry 8th creates this right, and requires it to be in writing. In declaring a Devise there all the requisites of the Stat. of Frauds and Perjuries must be stated. as that it was in writing and subscribed by three Witnesses &c.

Yet if a Covenant required by Com. Law and not required to be written, is required to be written by Stat. it is not necessary to declare it to be in writing. This applies to all executory Contracts under the Stat. of Frauds and Perjuries. The reason is the rules of Pleading are rules of Com. Law. Settled while these Contracts were not required to be in writing. The Stat. does not introduce a new rule of Pleading, but a new rule of evidence.

Why then it may be asked does not the same reason hold in case of a Devise before stated? I answer the distinction is cannot because a Devise being unknown to the Com. Law there can be no rule of Pleading it established by the C. Law

Salk. 519
6 Coke 38
12 Mod. 540
1 Bls. & W. 279

The Stat. of Devises creates a new species of Conveyance & Instrument not merely a new rule of evidence

But still if any of these Covenants or agreements contemplated by the Stat. of Frauds and Perjuries and by it required to be in writing are to be pleaded in bar they must be averred to be in writing because as Justice Buller says in his Law "prima facie" a Case

of

Bl. Com. 279 of action in the Pltf. he must so say it only by a Bar. Complete in all its parts.

In declaring upon a Deed or writing the Pltf is not bound to set forth any more of it than is necessary to entitle him to a recovery

It is commonly the case that Contracts contain stipulations on both sides. When there are these distinct stipulations some of which are of no use to the Pltf the Pltf need not state them in his Declaration. The Pltf may pray oyer and take advantage of them if he chooses by way of defence. This rule however must be understood with some qualification, for if the stipulation is embodied or incorporated with the particular stipulation united in the Declaration, the Pltf must state it because it goes to make a part of it either by qualification or exception. As if a Covenant to pay a certain sum in work & labour the Pltf must set this out. Now here the proviso is incorporated with the cause of action and goes to a description of the thing stipulated. There is a promise and a Condition precedent and they must both be stated So where are Covenants for quiet enjoyment and Dampt 042. the payment of rent the rule is the same. These are the only Cases form the only exception to the Gen[l] rule.

It is a Gen[l] rule in declaring that a deed from the facts stated the Law will imply a Contract it is not necessary for the Pltf to recite the same

Comyns 357 Dr. 325

on

or in other words to aver it As in Debt upon a Bill — Lawes 49
he must state the promise as well as the facts 2 Roll 74
which go to shew the foundation of it.

All Declarations are either General ..... or ..... Special.

A General Declaration is one which states the cause of action generally. A Special Declaration is one which states the cause of action with particularity & all the Special facts.

Indebitatus Assumpsit "for money had and received" is a general Declaration when it does not state the particular facts or the Special manner in which the promise is to be proved tho, if all the facts had been stated it would have been a Special Declaration 4 Bac 8.

When an action is brot on the penal part of a Bond without declaring on the condition the Declaration is general, and is used both in Great Britain and Connt. Though the party may declare on the penal part and on the condition too. and shew in his declaration that the condition is broken * This however is an unusual way of declaring. It is like what Lo Holt says "teaching to sow we go to the Mill" 4 Bac 8 * this is specious Dav 54 2

In Ejectment the party merely states that he was on such a Day Lessee &c when he was disseised & a Title without declaring the title this is general. but if he states his title as in an Devise it is a Special Declaration Note 8

5

Of the Joinder of parties in one Declaration

There are a vast number of Cases which shew the particular instances in which the joinder of parties is had. A Joinder in Action is where a suit is brot. in favour of two or more Pffs. or agst. two or more Deffts.

5 Coke 17a
1 Saunders 291
Do. - - 153
5 Coke 18.
5 Vin. Abr. 551.
1 Comyns. 10.
Co Litt. 164
1 Bac. Abr. 532
2 Do. - 690

When two or more persons are jointly interested in a right they not only may but ought to join in any action which may be brot. for its violation. And the rule is the same whether the action is Real, Personal or mixed or whether it sound in Contract or Tort. As in the Case of joint Lessees, or Joint Tenants. As the right is in him in whose the violated right is so it is in them in whose the violated right is. So Tenants in Common must for certain purposes join in an action of Trespass. *

* But as to Ejectment they cannot for the purposes of this action be considered as separated

2 Stra. 820.
5 Mod. 18.
1 Salk. Rep. 67.
5 Coke 18.
Salk. 42, 90.
Stra. 1140.

There is however a distinction between the Cases of Contract and Tort, as where the action is brot. on a Contract the non-joinder of a necessary Pff. may be taken advantage of under the General Issue or it may be pleaded in abatement. Because the Contract proved cannot be the same as that declared in the Declaration

5 Mod. 1, 7, 100

Thus if a Promise is made to A and B. and it declares upon it alone he cannot recover in the right of B. who possesses an undivided moiety of the right.

But when the action is founded in Tort the non-joinder must be taken advantage of in a

a plea of Abatement and not upon the Genl Iſſue. As if A and B own a Mare which is taken in Trespass, and A outlaws for the Trespass alone abatement must be pleaded — 5 Salk. 700 Salk 4. 290 Sayer 1140. 5 Rep^ts 551 (D^e) — 551.

In "Salkeld" one of the Cases cited is agt the opinion, but that has been questioned and seems not to be Law.

But when a Joynal right is violated, i.d a right vested in one person only, another person may not join with him in a Suit for the violation of that right. This would be a misjoinder, and a defect in the declaration. For tho' the Deff^t is liable to the whole person he is not liable to a Stranger. As if A and B, Shand Sue for a Trespass committed on the Land of A alone; this may be taken advantage of in a plea of abatement, and the better opinion seems to be upon the Genl Iſſue likewise, but this is not clear. — Bro Eliz 143 1 Leonard 315 1 Cord^y 13

In actions by Joint Ex^rs all must join, tho' one is under age so that he cannot act tho he has not proved the Will, nay tho he has refused the trust. The reason of this is the right of the Ex^rs is so strictly joint that it cannot be severed. The rights of two Ex^rs are identical. Tho' one of the Ex^rs may not be competent to Sue, yet he must be named in the Suit. Vide what is to be done? Why then the Suit must be brought jointly and on default of the Ex^r who will not act, may then be made — 1 Saxon 264 Salk 3, 37 (D^e) — 90 4 Coke 37 Yelverton 130

But

But there are rights which cannot be holden by two or more jointly and therefore two or more cannot sue for a violation of them. The right of personal security and personal liberty never can be joint tho the right of property may be In the two former cases there can be no such thing as a joinder of parties.

4 Bac 10
Cro Eliz 512
2 Bls Rep 5
Esp Rep 504
2 Wilm 427
2 Str 975

Neither the same action for words can be spoken of two persons. they cannot join. the right of ones reputation is not the right of the other The character of each is his exclusively and no joint right is violated

If I publish a Libel of two persons they cant join in a suit against me. there is no joint right violated. So if two or more persons are beaten by the same person they cannot join for the same reason

As to the Joinder of Defendants

6 Co 74
Esp Rep 504
2 Bls Rep 5
2 Bac Ab 15

the true rule is this. If the cause of action arises from the joint act of two or more parties they can be sued together. If not they cannot be joined as Defendants. upon this point as to the reason of the rule there is nothing said in the Books

Suppose then two persons at the same time and place utter the same slanderous words of me can I sue them together or at the same time in one action. My act in speaking these words is not your act. There is no joint act in the case

4 Bac 511
Sylvester 124

Thus

There are cases where persons may be joined when they unite in the same act. Thus if two persons join in a Trespass they may be sued together on the act of each contributes to give effect to the act of the other. All the acts are considered as one and indivisible one. Sothey may be sued severally.

So in malicious Prosecution which is a Tort also they may all be joined. Slander however does not stand on the same ground with a malicious Prosecution Slander being a "wrong" merely while malicious Prosecution is a Tort. The fact is according to "Justice Bullr" every cause of action arising "ex delicto" is not a Tort. and he takes this distinction viz in every cause of action arising "ex delicto" there must be some positive act. some degree of violence or force to make it a Tort Slander arises "ex delicto" but is merely a "wrong" there being nothing but word spoken. no positive act committed to make it a Tort. But in a malicious Prosecution there is something more than word spoken a positive act is here committed. All to Slander is a "wrong" and malicious prosecution a Tort Still they are Causes of action of a sufficiently the same nature to be joined in the same suit. for they are both actions on the Case

So if two join in publishing a Libel they may be sued jointly. for one may write one part. and the other the other part this suf-

Hob. 67
4 Bac. 10
Salk. 202
2 Burr. 985
2 Keb. 199
2 Bl. H.P. 5

Supra

Supra

fices.

suppose a Tort. an act done

In the case of Torts the rule of distinction is this "those acts in which the Law supposes any degree of force may be committed by two jointly" when this cannot be supposed it cannot be committed jointly

In enquiring what Torts may be joined in one Declaration, observed that there are certain acts which cannot be committed jointly, & cause an action for a violation of them cannot be brought.

Further. Two persons cannot be joined in one Declaration as Defts for a distinct tort by them committed severally. Thus if A commits a Trespass upon B. and B afterwards commits a Trespass upon B. of the same nature he cannot sue them together. Here the cause of action does not arise from the joint act of both parties

In case of Contracts if there are two or more persons covenanting jointly under a Contract and one of them dies his Executor & not the Survivor can join the Survivor in an action on the Contract being joint the whole remedy survives to the survivor Thus a Bond is given to A and B jointly A dies the whole right of action survives to B

If two or more persons bind themselves by a joint Contract they must all be joined as Defts in the action. Such is not the covenant

Com-

1 Wms 153. 4 Bac. Ab 10

1 Bos & Pul 446. 1 East 497 1 Ld Raym 154

Salk 393 2 Vern 99.

Contract of either of them. It is not his or any individuals Contract. but theirs i.e. the Contract of all together — 3 Bac. 697 Salk. 398.

But if two or more bind themselves jointly and severally each or all may be sued at the Pltfs election for it is the act of each as well as of both or all — vide supra

But if three or more bind themselves by a joint and several Contract the action may be brot agst all or any but it cannot be brot agst two if he cannot sue more than one unless he sues all. for the Contract must be Contained as joint or as several If it is a Joint Contract all must be sued. If it is a several Contract only one can be sued. But he cannot make the Contract as two think joint and the other third several. This is Contrary to the Contract — Sylvester 24 1 Sid. 238 3 Keb. 782 Ca C 1 Saunders 291

And if two or more bind themselves together by one Contract it is joint & Cond. unless the terms of it imply a several or obligation. It is true the word "severally" need not be used, other words may be used to shew that it was the intention to be bound severally E.g. If a Promissory Note is drawn thus "We promise" &c this is a joint obligation. — 2 Mk. 3. Whitby 375 1 Ld Raym 234 5 Burr 2611 (joint) (jointly)

If A delivers goods to B to be delivered over to C and B fails to deliver A and C cannot join in an action agst him. For this each may have a right of action agst B still it is on different grounds. 1 Bro. 429 Pfts. — Cannon the Consignor may for the goods and his &c

* This case is not to be reconciled as was fully explained under the Title of Bailments to Lodge their rights will arise from the Contract & therefore the Consignor can be considered as the Contractor with the

4 Bac. 9, 10 This rule is established as it is laid down but Mr
1 Ball & B. 68. Gould thinks that C in this case has no right of action
Hard. 321 whatever for B is his agent not C's and C is no ways
privy to the transaction

Chitty 220. It is supposed that if Goods are delivered to B
Pawl. 343 to deliver to C & that C must sue in Trover if money
D. — 353. then the action must be Indebitatus Assumpsit

And as to a Contract which is joint with
respect to Obligees when one dies his Ex.r or Adm.r can
sue alone or with the Survivors. So on the other hand
if two persons bind themselves by a joint Contract
and one dies his Ex.r is not liable to be sued in a
Suit, at Law with the Surviving Obligor or debtor.* At
Law he cannot be sued after the death of the Sur
vivor. It is the nature of a joint interest and a
joint duty to survive entire to the Survivers (but)

* The principle is the same "mutatis mutandis" as where there are two joint Obligees & an one dies —

But if two bind themselves by a joint and
Vol 3. 156 Several Obligation the Ex.r or Adm.r of the deceased
1 East 400 Obligor may be sued alone, and at Law they cant be join
ed with the Surviving Obligor. So if there are
two or more joint and several Obligees the repre
sentatives of the deceased may sue on the Obli
gation

* I don't mean that the Surviving Obligor can have no remedy against the Ex.r or that he can't be sued jointly & severally with the Ex.r (for so he may & the Ex.r may be sued with the Survivor) but only that the Ex.r is not liable to be sued at Law alone as the Survivor is.

As to suits against Ex.rs the rule is "those
two must be sued against who have administer
ed and not against those who have not administered
Thus may be three Ex.rs and one refuses & the Creditor
is to bring his action against the two who have ad
ministered This is different from the rule at Law

Ex.rs

Ex^rs and Sued, But here no Fraud is done he is liable to no Costs. But in this last Case where they are Sued it the Ex^or who refuses the Trust does not appear Judgt will go agst him and he will suffer without a Possibility of remuneration. Besides when Ex^rs are Sued nobody knows who they are till they have administered

Com^s Abr. 710
Levinz 161
3 Mod. 255
1 Sanders 291 g

Of the Joinder of different Causes of action in a Suit

Some Causes may embrace Several distinct Causes of ground of action and others not.

And here the Genl rule is "that Several Causes of action Com. of the Same nature may be joined in one Declaration between the same parties

Thus if A. holds two promissory Notes, agst B. he may Sue on both of them in one Declaration and this Declaration will Contain two Counts

4 Bac. 11
Com. Dig. 244
Thirby. 140
Do or — 160
Com. Digest "Action" G. 1
* Each cause of action should have a separate count.

By this rule it is said is meant if Several Causes of action require the Same Judgt at C. Law they may be joined in one Declaration

They are said to be of the Same nature (as explained in a former rule) when they require the Same Judgt at C. Law

4 Bac. 191
1 Bac. 30
2 Wilson 314
1 Vent. 360

For the Purpose of understanding this rule it is necessary to know that at C. Law Civil Actions there were two kinds of Judgts viz one a "Misericordia" and the other a "Capiatur pro fine" Under a "misericordia" the Party is amerced but this Person is not taken to satisfy the Judgt

* For a Division from the Party, but yet right —

Com

Under a "Capietur" he is fined* and his body is awarded to pay the fine.* In all Cases Com- -mitted with force the Civil injury is connected with a publick wrong and of Course the Judgt. is a "Capiatur" In all Cases laid "with force and arms" the Judgt is a "Capiatur" When it is not laid with "force and arms" it is an "misericordia" or in other words when there can be no force presumed the Judgt has Judgt it is a "misericordia" This rule is not universally true: tho it is generally given in the Books.

* 2 Mod Capiatur pro fine.
* What you call the King is bound a sum to the Party
1 Wilson 252
1 Ld Ks 270
(2 Danv. Abr 552
1 Keble 147
5 Bac 191
Cro Eliz. 20
D° — 310
1 Bac. 30
2 Wilson 319
1 Vent. 366
1 Wilson 252.

It is universally true and known that if Several distinct Causes of action arise out of the same Judgt. at C.L. and the same Plea or Gen. Issue they may all be joined in one Declaration. As when A has Several Bonds of B. the issue in all is "non est factum" and therefore they may all be declared upon together So if one has Several Covenants by Deed they may all be joined.

1 Wilson 252
1 Ld Ks 270
* In Cro Eliz 20 Plaintiff declares that Defendant in Consideration that he would marry the Plaintiff promised to pay him 100l. Defendant pleads that he did not promise &c. Plaintiff replies that he did promise &c. and issue is joined thereon. Plaintiff recovers and Defendant brings a writ of Error. Judgment affirmed.

One is entitled to a recovery on Several Grand Promises to be issue in all is "non assumpsit" and the Judgt is a "Misericordia"

And so if one person has Committed Several Trespasses with force agt another they may be joined in one Declaration and so may Several Actions of Trover &c. for the Judgt is a "Capiatur" and the Gen. Issue the same

So-

So several actions of Trespass on the Case may be joined in one Declaration. and so may several actions of Grover. Grove with negligence may be joined as agst all Bailees. Grove and Slander may be joined and so may Slander and malicious Prosecution.

8 Coke 7, 8
2 Bl Rep 848
1 Wilm 252
2 D°. 314
Cas. t. H 230
3 Cas. t. 70
1 Vern. 223

But these examples of the admissible joinder of Causes of action are those where the Judg. and the Gen. Issue are the same. But should the Judg. & only is the same the Causes may be join'd. This is not universally the Case but it is sometimes. Thus Debt and Detinue may be joined in one Declaration. The Gen. Issue in Debt is "nil debet" in Detinue it is "non detinet" but the Judg. are the same, and they both arise "ex Contractu". Debt on Bond and Debt on simple Contract may be joined, but the Gen. Issue in the two Cases is different.

Doug. 652

4 Bac. 11
Cooke's 20
Do. — 315
1 Vern. 300
1 Rolle 147

"Swift" Cases Detinue under the head of Torts and wanted to be understood the idea that Trover was a Tort and that it was substituted for Detinue. but it is indiscriminately Cases.

35 Eliz. 656
25 Eliz. 1271
1 Wilm 171
Carth. 235

causes of action of the same nature & arising from the same person in different rights can't be joined in one declaration. 1 Salk 33.

Salk. 10

To exemplify the negative part of the rule Trespass and Contract can never be joined in one Declaration but the Gen. Issue and the Judg. are different.

4 Bac. 21, 30
1 Mod. 42
So Slander and Assumpsit but Trespass on the Case & Assumpsit on the same matter under the Latin or Contract but the Gen. Issue different

By the way. I forgot to mention the true reason of the rule. It would introduce endless Confusion into judicial Proceedings to join all

Causes

Causes of action in a suit, because there may be often as many different pleas required as causes of action. In Action a Real action is brot. there is one Gen.l Issue. Trespass is intended in the same declaration, here is another Gen.l Issue. The Law permits the joinder of several causes of action when it is convenient, without Confounding the advancement of Justice

Trespass and Trespass on the Case arising "ex delicto" cannot be joined in one declaration because the Judg.ts are different. Within Can Case and Contract be joined. here the Judg.ts are the same but the Pleas are different and so are the nature of the actions. Covenant and Debt on bond cannot be joined. The Pleas are different.

It is true in general however that several actions or Causes of action in Trespass or the same in Case, or the same in Contract, may be joined together, although each of them in its particular Case, may be different.

This is not however universally true. There is at least one exception and I don't know but more, i.e. Debt and Account cant be joined in one Declaration. The action of Account is altogether "Unique" The Gen.l Issue is different, the Proceedings in the two actions are different. Indeed in Account the Proceedings are altogether different from any other action at

C

2 Wms Saund 405 contra in Court

4 Bac 11
Watkins 211.
5 Mod 90
1 Vent 366
Hob Rep 233
Lee Rep 58.
2 Salk 634
2 Wms 319
Carth 169.

Debt, Replevin, Covenant Can't be joined. So Trespass & Ejectment Quare Impedit & Case Trespass & Trover Can't be. the Judg.ts are different. at Com. Law. now altered by Statute. Vide Tidd

1 Bac 21
1 Mod 42
4 Bac 11

C. Law. In Debt the Cause is tried by a Jury. In Account the first is indeed tried by a Jury but then the Cause goes to Arbitrators who finally determine it. The Judges then are different for in a Ac. there are two Judges

Can Debt and Assault and Battery be joined in one Declaration. Since the Joyder action to the first is Ejectment and to the last Trespass. & ca. armis? This question has been much agitated. But Mr Gould thinks without any good reason. Since it is apparent in all the Modern Reports that the Judgt and the Plea are the same in both. Hobt. 249 Bac. Ab. Tr. 42

In Covnt. the general Issue is not the same in Ejectment and disseisin, yet Judgt is the same in both.

It may be observed that the Statt of Edward 4th (5th 48m and Mary) did away the distinction between the Judges in Great Britain but the difference is left between the Causes of action as formerly; for the Plff now pays a fine in the nature of a duty where he takes out a writ of Summons in Trespass. & ca. armis Vac. 3d. 465.

The distinctions upon this Subject are not settled by any general rule. There is very little difficulty arising from it however because Exam. Pleas are so numerous yet there is no positive rule except the numerical rule which

wch

wide as fully in all Cases. As it is a Gen.l rule tho' not an universal one that where the Judg.ts are the same, and the Causes not joinicly found there is no rule that will as fully to every Case that occurs. In Cont.t Mr. Gould thinks we ought to preserve all the distinctions as in Great Britain

The distinctions then appear to be these 1st. When the Judg.t and proceedings are both the same then always may be a joinder of different Causes of Action. 2.dly When the Judg.ts are the same they may generally be joined tho the Causes are different. But this is not always the Case. These are the only two affirmative rules. 3.dly. On the other hand where the Judg.ts are different there never Can be a joinder "a fortiori" where the Judgts and Caus.s of Act.n are both different there never can be

The only Case in the Books affirmative and rule. it admits of as many exceptions as the Cases coming within it

Mis-joinder of Causes of action in one Declaration

Salk.d 10
Carth. 430
1 Ro.d Abr. 168

The joinder of different Causes of action which cannot be joined is an incumbrance that the Def.t may demur to the Declaration. or move in arrest of Judg.t *

* Because the Court cannot determine what Judg.t to award the Cause under but the Judg.t is entered the common rule as to the Court's power in Cases of tort and contract, that Court can enter a Judg.t to the first Count

And here a distinction is to be observed Misjoinder of Causes has often been confounded with duplicity in pleading. Misjoinder to be

and

Such amounts to a duplicity. But it amounts to more than a duplicity. Duplicity is a mere fault in form, and can be only taken advantage of by Special demurrer. Misjoinder is an error in effect. The real distinction is this. Viz

A misjoinder of actions consists in joining in the declaration distinct causes of action which cannot be joined; distinct substantive grounds of recovery.

Duplicity in pleading consists in inserting causes of action which cannot be joined, to enforce only one entire and indivisible right of recovery

The latter is a mere fault in form. The former is a radical defect

Suppose A declares against B on his first count in Debt on bond and in the second alleges. B Below. Now in the nature of things the second count cannot be inserted for the purpose of enforcing the first count Here then are two distinct causes of action inserted for the purpose of enforcing two distinct substantive grounds of recovery Ergo this is a misjoinder of actions.

On the other hand A leases a House to B for 21 years upon this Covenant not stating the Contract expressly or impliedly and then avers that the Defendt. used the House wickedly waste committed. Now this also sounds in tort for A declares first upon a Contract. This Declaration is double. He charges him with

(page 264

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a wrong This however is also but to ensure one right of recovery. Here then is duplicity in pleading.

3 Wilson 20
Esp. 407
Salk. 642
4 Bac. 12
2 Wilson 313
5 Term 341
Law of Pl. 46 — 9
Cart. 388
Carth. 113
2 Ld Raym. 392
1 Hob. 555
2 Ld Raym. 1071
Stg. 43
Do — 202.

Trespass and Trespass on the Case "ex delicto" cannot be joined. Yet it seems that a declaration in Trespass charging his Horse destroying his Goods and beating his Servant "per quod Servitium amisit" is good. In the first Case you will perceive this is also one Continued Trespass. But this is another reason, according to the Course of Proceedings an action "per quod Servitium amisit" is usually accompanied with Trespass. with force. Tho' they are substantially different yet the "per quod" be is ranked matter of aggravation, than any thing else, & should go under either rather than this. It is strictly proper to join without saying a "per quod." because the beating will be considered a mere matter of aggravation as to the original Trespass. This may be questioned

When several actions are but for several things of the same nature, the Ct before whom they are depending may compel a Consolidation of them. i.e. may control a joinder of them in one declaration in several Counts This is mere matter of discretion. It is done when done at all for the purpose of preventing vexation.* Thus suppose A brings two actions on Notes of Hand agst B. The Ct may compel

* When the Ct thinks such a Course vexatious they compel it. Credit is for the sake of Mercantile currency & as such should stand.

e b

A to draft one suit and join both in one declaration in two Counts. Yet an affidavit that there are several defences so that the Jud would be entangled by all being joined will induce the Ct [illegible] Compelling a consolidation of them

Lamb. 6
Do 244
2 Stug. 1078
Do 1149
2 Ves. 539
1 Cond. 111
1 Chitty P. 195 to Note g.

Miscellaneous Rules respecting Declarations

The Declaration should always agree with the Writ. The writ is the foundation of all the proceedings. Since it is that which gives the Ct authority to hear the Cause. If then the Deft is called in the writ to answer a Bill &c. and in the Declaration is called to answer to Just &c. on the Case. (without an "ac etiam") the variance is fatal. the writ is abated. —

Dr. & Stud. 84
Cro Eliz. 325
Hob. 179
Do 180.
4 Bac. 13. 14

When the Pltf's right of action is to arise by the performance of some condition precedent on his part he must aver performance of that condition on his part in his declaration. The omission of this is an incurable defect and cannot be cured by a Verdict because it goes to the gist of the action. If Pltf declares in his own declaration that he has no right of recovery. Much learning is to be found on this subject of precedent and subsequent conditions in 1 Term Rep. 638. in the case of Holtham vs. the East India Company)

7 Coke 10.a
1 Term Rep. 645
1 Saund. 319
2 H. Bl. 574
7 Term Rep. 125
5 Com. 4.5
2 Ves. Jr. 240

But there is a material distinction to be observed with respect to the rule of pleading. when there is a condition precedent and a Condition

4 Co. Rep. 93
7 Coke 10
1 Roll. Rep. 438
Cro. Eliz. 300
1 Roll. Rep. 454
2 Do. 574
Cro. Jac. 574

Condition subsequent. For when the Pltffs right of action is qualified by a Condition subsequent he is not bound to take notice of the Condition. It is matter of defence and must be pleaded by the Deft. The right of action does not accrue by the performance of the Condition.

1 Vent. 177
Cro. Car. 245
Comb. 405
Hob. 88
1 Ld. Raym. 359
2 Mod. 309
8 Coke 10
2 Roll. Rep. 187
2 Vin. Abr. 240

If there are in one Contract reciprocal & independant Covenants or promises the Pltff need not aver performance of the Covenants or promises on his part. This is chiefly the Case when the Covenants are dependent, for then the Pltff must aver performance of the Covenant or promise on his part.

In the former Case it is Covenant for Covenant & promise for promise. The one is in Consideration of the other. A Covenants in Consideration of the Covenants of B in the same Declaration, and B Covenants in Consideration of the Covenants of A in the same Declaration.

But suppose A and B enter into mutual Stipulations so that A Covenants in Consideration of B performing his Covenants and B in Consideration of A performing his Covenants then whichever sues the other must aver that he himself has performed or has tendered performance.

1 Mod. 67
4 Bac. Abr. 67
2 Salk. 135
Cro. Eliz. 318

These facts which constitute the performance of the Action must be expressly and positively alledged. Nothing was implied in the Case of

I before gave when the Deft says "whereas the Deft assaulted &c. this would be ill; for the Gen. Issue would be "whereas he did not &c" 2 Lill 303. Cro Ja 301,

Formerly it was holden that an averment of this kind was a casual defect and not cured by Verdict I take it is not now to be Law. It is certainly good after Verdict and the general opinion is that it is bad only on Special Demurrer and is not the subject of a Gen. Demurrer. The old Cases on Pleading are much more strict than the modern ones.

But this rule does not hold as to such facts as are not traversable by Plea however essential they may be* and this inference I make from the established form of pleading in a great variety of Cases

In "Assumpsit" it is the established form of pleading that the Consideration is stated by way of Recital and not by direct averment. The Consideration in Assumpsit cannot be traversed by Plea because it would amount to the Gen. Issue

So in Trespass "possession" is the gist of the action. But the Deft may and shall that the was possessed of such Goods. He may shall that "whereas" &c. "&c." and this is not traversable by Plea. I take it to be clear then that the rule does not hold as to such facts however material which are not traversable by Plea. They must be stated directly and positively ———

Nor does the Gen. rule hold as to mere matters of inducement. (and by the way they are not

2 Roll. Rep. 521.
1 Lev. 99
2 D° — 203
2 Salk. 434
Cro Eliz 303
2 Lev. 200
Cro Ja. 301
2 Mod. R. 358?
In Smith Judge Parsons. Seems to be a doubt whether it would be bad on Demurrer.

Note 10th

* The reason for assuming it is that a Gen. Issue may be formed where the facts are not traversable — they may come in under a videlicet "whereas" &c. —

1 Lev. 107, 210
Cro Ja. 110
Hob. 5
D° — 18
4 Coke 18
10 Coke 77.
Pleaders.
Ld Raym. 10th

Note 11th

4 Bac. 43
D° — 14

Popham 177 Sylvester themselves of the offence of the action). The
Sylvester 70 rule does not in strictness extend to endowments

The subject of the suit must be described in the Declaration with certainty See the rules above with regard to certainty in Pleading.

It is said to be sufficient if the Jury can learn what is meant Thus in England Tenements and Lands of a title and not described as in Court but only the Jury know what it is.

It has also been holden that Grocer had for a "Ship and Sails" was a sufficient description the Grocer but for "Some ships" or for "Some Ships Risen" was holden bad. But for a "Library of Books" it was holden a sufficient description. But this is quite too loose and vague. The decisions are some what arbitrary

If the Declaration is good in part and ill in part it is not for this cause demurrable

Holt 178. The Pltff may recover for that part which is good
1 Rolle 784 Thus if the Pltff sue on two Bonds and it appears on
10 Coke 115 the face of the declaration that one of them is not
Hob 265 Cro Jac 395 payable or that it is void the declaration is not
Sylvester 45 demurrable for if he can recover on either of the
Cro Jac. 104 Counts that Count is good and on it he is entitled
1 Lord 286 ult to Judgt
2 Dr - 379

This rule however seems to not in its nature to be confined to those cases where there is one entire Cause of action wile declared on. For if the Declaration is ill in one part it will in

the

the facts make out a cause of action. The declaration is demurrable for all the facts expressed & unpleaded are necessary to constitute one ground of action. The declaration is ill as to entire cause of action

Note. 12th

For there are 2 distinct demands in one count entire one of which is good and the other ill. tho' the declaration is not demurrable yet if the Plff obtain a general verdict and entire damages Judgt must be arrested. Trespass an action for Slander for two distinct sorts of wrong if one part is bad and verdict & found entire Judgt must be arrested. So the Ct cannot determine how much was given on the false ground

Hob. 178.
Str. 833 8
10 Coke 130.
3 Wilson 177.
2 Burr 985
2 H. Bl 318.
1 Ld Raym 508
Do — 532
Salk 384
Do — 532
1 Wilson 171
Stra. 1094

And here it is necessary to explain what only the true reason of this Rule but the distinction between this and common cases of arrest of Judgt

You know it is a general rule of pleading that every defence which will support a motion in arrest of Judgt will support a general demurrer

But here arrest of Judgt takes place and yet the Declaration is not the subject of a gen demurrer How is this Case reconcilable? The answer is easy The rule above laid down relates to insufficiency in the pleadings. Here is no such insufficiency in the present Case. The Declaration is good The insufficiency is created by the Verdict. It is arrested for defect in the Verdict. There is therefore no difficulty in reconciling the Cases

You [illegible] then proceed to the trial

Print

shunt of the rule, when the Ct can ascertain after Judt from the face of the record the precise amount of each distinct demand Judt will not be arrested, altho there is one bad Count.

If the Jury shall find a pltff greater damages than the Pltff demands this will not of Course do where the declaration is in action. In that Case the Pltff may release the surplus and take Judt for the residue, or the Ct without a release may give Judt for the sum demanded. * The Jury are not authorized to give more than the Pltff demands, for the Deft has not been called to answer to more than a certain amount & remittitur when may be entered by the Pltff

The rule is the same if the Pltff demands more than by his own shewing he is entitled to. if the Jury give more than he is thus entitled to. Here he may release the excess and take Judt for the residue. This may & does happen in actions on Contracts. The rule of damages on Bonds is the Debt and interest. The Jury can give no more. If when the Pltff demands more than this and the Jury give it he may remit the excess or the Ct may do it Course

A Declaration may be cured by a Plea and Cas. even if it is faulty in substance. This was treated of before under the Gen. rule of Pleading

(We now

Holt 178
* For the Judges Construction of the Record — This rule holds only in Civil Cases where the Jury after the damages indefinite must be —
Stiles 304
4 Bac 25
26 — 223
2 Salk 280
Str 403 707
Cas. 58
10 Co Rep 115
Croke 8
* Thus in order to shew the reason of the rule it is observed that when Judt is entered by default the Pltff may before Judt is actually made up by release remit the damages
4 Bolle 785
4 Bac 20
Co Lit 304
2 Bro Pl Ca 113
Do — 123,
Read 175
And the Pltff may do this same after demurrer —
1 Sam 282
Do 285 note 5
Com Digest
Rules 685
Page 423

We now come to treat of the Pleadings which follow the Declaration. These Consist of those allegations which the Deft makes by way of defence and those which the Plff makes by way of answer to the Deft's defence

Pleas are of two kinds
Dilatory Pleas and Pleas to the action

Dilatory Pleas

Dilatory Pleas are used for the mere purpose of delay and filed without any foundation in truth whatever And if an issue in fact was taken on them it went to the Jury.

But now by the Stat. 4th and 5th of Anne no dilatory Plea can be admitted without an affidavit of its truth or some circumstantial matter to induce the Ct to believe it to be true And this affidavit is made under the pains and penalties of Perjury

In Cont. we have no such Stat as this and have no need of any. Every pleading or false Plea here would answer no purpose because it could not of Course procure an imparlance

Our Stat requires that all dilatory Pleas shall be tried at the Commencement of the term of Course it can procure no delay. Issued in the Cons Pleas they are to be given in heard and determined within three days after the Commencement of the Term. These

3 Bac Abr 363
3 Wilson 51
4 Bac 35 2d 51
1 Chit 2

These dilatory pleas are subdivided into three kinds. I shall pursue the division of Blackstone. It is the most concise, and best calculated to give a just idea of the subject. They are
1st Pleas to the Jurisdiction of the Court.
2d Pleas to the disability of the Pltff. and
3d Pleas in Abatement. — of these in their order.

II Of Pleas to the Jurisdiction of the Court.

Cas. Th. 354
Lutw. 11
Bac. 5
3 Bac. 301
Salk. 544
1 Com. 3.
2 Bac. 207

The causes of this plea are various. It is a ground of objection to the jurisdiction of a Ct of limited jurisdiction, that the cause arose out of the local limits of that Court. This rule in Court of Pleas, as to the Cts of incorporated Cities.

So also if the Defdt has any privilege by which he is not liable to be sued in a particular Ct or any other than a local limited Court. If then he is sued in any other this plea may be put in. This has been considered as a plea to the person but it is not. As in the case of Attorneys when the Ct of which the Attorney is an Officer has not cognizance of the subject matter he may be prosecuted before any other Court. Is this a plea to the jurisdiction or to the person? Clearly to the former. The plea is "I am an Officer of another Ct" therefore this Ct has no cognizance of my person. I am not bound to answer your complaint here." In Court. there is no such privilege.

This.

This privilege of Attorneys holds only agst them in 4 Bac 30-7
actions but agst them in Cro Eliz 585
their own right and not in auter droit. Thus if an 2 Salk 2
action is brot agst an Ex^or he is suable just as any Hob^t 177.
other Ex^or is. He is sued in right of his Testator and
he cannot communicate his privilege to the Assets of his Testator.

So if he is sued with another who has not
the privilege he loses his privilege. This privilege
is not communicable. His Co Defft is liable and
so must he be.

3dly Another ground of exception to the juris-
diction of the Ct is the want of cognizance of the
subject matter of the suit. Thus if a person is 4 Bac^n 35
indicted for murder in the Ct of Comn Pleas he 10 Co^ke 68
may plead to the jurisdiction of that Ct. or Do 76
when one is sued in a real action in B.R. 1 Vent^r 333
the same plea may be used. It is to be obsd 1 Cast 352
tho the Defft need not plead in this case to the
jurisdiction of the Ct for the proceeding (if any
are had) are "coram non judice" and therefore void
Whereas the Ct act in such cases they act
extrajudicially.

When there is a want of jurisdiction aris-
ing from some personal privilege of the Defft
or the cause of action arises out of the local lim-
its of the Ct the Defft must plead it, or he waives
it. when the subject matter is not cognizable
by the Ct it need not be pleaded for the Court are
bound "ex officio" See Fitz^d of Falso Imprisonment
for authorities.

An-

Anciently no action which was Local could be tried except in the County where the Cause of action arose. This is not now the case as to Cts of general jurisdiction. It is therefore no ground of exception to a Ct of general jurisdiction that the Cause of action (where the action is transitory) arose in a foreign County. The forms of pleading Causes—pass indeed with the old strict rule of Com Law and the Cause of action is alleged to have arisen in the County. But a "videlicit" is always inserted. This obtains only in transitory actions

But as to Local actions it is otherwise. Thus where the Subject of Suit is "in rem" it is impossible for the Ct to try it if the subject is in another County. As in Ejectment. The rule is the same also in Criminal Cases. The penal Laws of every foreign State are strictly local. So Cause of action is strictly local. So an action of Debt on Covenant as to the Statute of Q. Anne is local because the Covenant which is real runs with the Land against the action is founded on the Covenant which is local. Personal actions are generally transitory and mixed actions are local. The first follow the person of the parties.

A plea to the jurisdiction is regularly the first plea in the order of pleading on the part of the Defts for the exception when may say to be taken by plea is waived by any other plea taken in a Case where a want of jurisdiction might be pleaded. another plea is put in he submits to the jurisdiction

But

6 Mod 194
7 Coke 24
1 Salk 241
Cowper 181
Do — 175
Do — 181
2 H Bl 145
Do — 181-2
Lawes — 74
2 East 574-80
Cas Pl 183
Hardy 25

1 Salk 22 = 174 + 233

Act Law — When the subject of the action is local the action shall be laid as in Fact by a fiction we are to be — — — the in town known

1 Mod 127
Hob 164
2 Bac 7.28
Barn 35
1 Com 50
Co Litt 172

But there are Cases where the Deft cannot give jurisdiction and there are where the Ct had not cognizance of the subject matter. So also in local actions.*

* The proceedings are coram non judice and void so may be taken advantage of in many Stages of the Proceedings the same subsequent.

Attending to the English Practice a Plea to the jurisdiction is always to be signed by the proper Principle and not by his Attorney because if done by an attorney it is supposed to be done by leave of the Ct and asking leave acknowledges jurisdiction of the Ct All other Pleas are regularly signed by the Attorney. 6 Mod 145 Barnes 190 3 B Com 303 4 Bac 35

In Cork we dont make this distinction. The Attorney signs this as well as any other Plea. The rule is somewhat artificial and can be of no use

This Plea Concludes to the Cognizance of the Suit by praying Judgt whether the Ct will take further Cognizance of the Suit. The form is "And the said A B prays Judgt whether &c" 3 B Com 303 Salk 198 Lawes 106, Carth 363

In Comn Law when an action is dismissed on a Plea to the jurisdiction Costs are taxed in favour of the Deft. When it is dismissed by the Ct "ex officio" no Costs are given.

It seems to be questionable whether the Ct can order Judgt for Costs when it has no jurisdiction of the Suit. It has no right to render Judgt except for that on which it indispensably must pass. This practice of Costs Mr Gould is undescribed. It is said the allowance of Costs

is,

is intended to prevent the Deft. from suing the Pltff for malicious prosecution. But this cannot be effected. The costs taxed are not a rule of damages nor do they an actual indemnification. Besides the Deft ought to have a right to have his costs taxed by a Jury.

Thus far of Pleas to the Jurisdiction.

III Pleas to the disability of the Pltff

The grounds of the Pleas are various especially in England

1st Outlawry of the Pltff is a good plea to his disability. This is a Fiction unknown to our Law It is predicated upon Judgment in the State of New York

4 Bac. 2
4 D° 35
1 Hawk. P. C. 3
3 Bac. 671-2
D° 702
Litt. Ten. 197a
Co. Litt. 128
12 Vin. Ab. 400
4 Bac. 35
Laws 1824 34

* If the disability of the Pltff at the time the cause of action arose continue until the suit be commenced it is a temporary disability, if not it is a perpetual disability

The outlawry of the Pltff unreversed or judgment obtained is a good plea to his disability. Because the outlaw is out of the protection of the Law that he cannot enforce his rights in a Court of Justice.

This is not however an actual abatement of the Suit. It is only a temporary stay of proceedings for when a pardon is obtained or the outlawry reversed the Deft may be called to answer in the same Suit. if the cause of action is still remaining.

Vin. Ab. 11 128
3 Bac. 702

This disability extends only to those Suits Pltff has in his own right and not to those taken in the right of another. As if he sues as Ex. it is no objection that he is an outlaw. The outlawry is intended as a punishment for him

But

But if it might be pleaded to an action brought by him as Ex^r the punishment would fall upon the Creditors, or representatives of an innocent man — 1 Mod 128

But an action brought by an Ex^r or Adm^r the outlawry of the deceased Testator or intestate may be pleaded for here the disability goes to the person whose right is to be enforced. The testator could not transmit to another the right to prosecute a claim which he himself could not enforce — 1 Com Dig. D; 1 Bam & C. 65; Lutw. 1604

But tho an outlaw cannot bring an action in his own right he may be sued as any other person. The outlawry is intended to deprive him of his civil rights not to furnish him with an immunity. — 3 Bac 701; 1 Sid. 60, 1 Roy 1

This disability is always pleadable as a dilatory plea and sometimes may be pleaded in bar. The reason of discrimination is this. "When the cause of action is forfeited by the outlawry the disability may be pleaded in bar as well as a dilatory plea. As in Felony where the action commits his goods Chattels Lands or Tenements for they are all forfeited by the outlawry. On the other hand where the cause of action is not forfeited by the outlawry the objection can be taken only by way of dilatory plea, and this is always the case when the damages are presumed, as in Slander, malicious Prosecution &c. Because these Causes of action cannot be forfeited they are inalienable and even when the damages are not — Laws 38, 107; 3 Bac 14; 3 Bac 701; 5 Coke 109; 1 Salk 29, 6; 1 Mod 128

7 Coke 29 b
2 Lyn 32

act, he cannot plead it. If the action commences pendente lite and the property is not forfeited the disability can be pleaded only as a dilatory plea.

2nd Excommunication. This is a second ground of pleading to the disability in England. This prevents the Pltf from suing in his own or another's right. As he is supposed to be no longer qualified to dispose of Goods in pios usus which was formerly done by Exrs and Admrs. And this rule now in Great Britain. This plea does not abate the writ but only discharges the Deft from "sine die" liable to answer to the same writ when absolution is obtained.

4 Bac Ab 3
2 D° 34 & 30
2 D° 319
4 Rolle 883.
6 Co 66 b. 133-4
3 Coke 63

3 Bac Ab 320.
2 D° 820-8
6 Co 66 b 133-4

Absolution is the only good replication to this plea. Here again we see how dilatory pleas differ from pleas in abatement.

This species of disability is unknown in the U.S.A.

3rd Alienage. A third ground of pleading to the disability of the Pltf is alienage. This is sometimes pleadable to the disability but not in all cases. For the purpose of considering the subject we must look at the distinctions on the subject of Aliens.

* As to who are Aliens by Com. & Stat. Law of Engd see 1 Bl. Com. p. 308 & c. 10 & 380 & 1 Bac Ab Aliens A

An Alien friend if not naturalized or made a denizen can maintain no action real or mixed. But an alien friend may maintain personal actions. The reason of the former rule is the cant hold Land. The policy of the Com Law is

is such that he cannot bet every real action is for the recovery of Land. He cannot hold Land then how he can't maintain them. But an Alien friend may hold personal property therefore he may maintain and an action for it. In actions then Real and mixed it is a good ground of defence that the Plff is an Alien. In personal actions it is not so.*

In Shirley 413 See a strange decision, not Law however

The distinction was taken related to an Alien friend. On the other hand it is a general rule that an alien enemy can maintain no action whatever either Real personal or mixed. An alien enemy unless a prisoner of war can hold by be in a Situation to bring an action. But a prisoner of war can maintain no action generally before Os acting under the authority of that Government which holds him a prisoner. By this you will not understand that the personal rights of a prisoner are destroyed. No. the public will punish one who violates his rights. The reason of the rule is founded on a State policy because the enemy of that State tends to strengthen their adversaries and enlarge their resources

There is an exception to the rule of an Alien enemy. He may maintain an action as a convict even tho he be made a prisoner with his baggage, and this under the Law of Nations as recognized by the municipal regulations of every Government. Indeed if this were not so then Law

Com Dig 171
3 Bl Com 384
Fitzac 4
Co 83 4
2 Bl Rep 1092
1 Sug V. & P. 10 3 82
1 Bl Com 371

* See an account of the Law and Usage of Nations on this subject in Cunningham's Epitome of Jacobs Armorian Edition "Alien"

6 Com Dig 79

Alien friend a merchant may in case of a Declaration of War from his Sovereign to England be sued
Bac Abr Alien (C)
Peake Law 36
Co Litt. 2.
Sug V. & P. 1082
Bl Rep 1163
6 T Rep. 23
Do 44
Doug 626
Do 649

some

ransomed could never take place. Good faith and honesty between foreign States would be done away

A celebrated and interesting Case is report-
Doug. 4 625 ed in "Cowper" 161. where it was contended that no
Doug. 4 519 money ought to be had because the alien enemy
Cowper 161 who Ent. the action was a prisoner of war, that
3 Burr 1734 the hostage and ransom bill was both void taken and refused no longer the enemies property. But Ld Mansfield in a learned argument-over ruled every objection and decided in favour of the Alien enemy.

So also an alien enemy residing
2 Ld Ray 282 in a Nation at war with his own under a li-
Salk 46 cence & protection or safe conduct, can generally
Stg 1082 maintain personal actions. But in this
8 Ed Rep 108 case he is not an alien enemy "generaliter" he
Forbes 221 is a member of the State and a civil friend.

Whether an alien enemy not residing
Hiernus Indian
a Ward-one is and
Alien enemy dies
on the Deft it is
not pursuable
Stg 1082
4 Bac Abr
Executors &
under a licence & protection &c. can maintain
an action in right of another as Ex, or Adm.
seems to be doubted. The point has never been
judicially decided. Reasons of policy are against
it and reasons of justice are greatly in favour of
it. Sometimes the former reasons are also in
favour of A for the effects may belong to the
Ld Raym 142
" " 183
Cro Eliz 8
4 Bac 84
* until Parliament
Kings or Queens
pleasure be
subjects of the Country where the action is laid,
& the alien friend may hold Leases as Ex, but in
his own right he cannot, of course, (the being
an alien as Ex) the owner a Lease to his alien

age

a Lineage is not pleadable to his disability.

4th Præmunire. Popish recusancy. Attaint of Felony. and being a Monk professed. are all disabilities in England. but as they are unknown in our Law nothing will be said of them. 4 Bacon 380 / 3 Bacon 361 / 1 Bacon 7. / 4 Bac. 35 / D° — 148

In some of the U.S. there is however attaint for Treason & Felony. but it is not certain that in those States this is a disability At any rate it can be of no consequence to us.

5th Coverture Another ground of pleading to the disability of the Deft is Coverture. — This is when a Feme Covert sues alone without her Husband. the Deft may plead to the disability and abate the suit. The distinctions on this subject are all to be found under the Title "Baron and Feme" 4 Bac 39 / 6 Litt 132 / 9 Cohen 448-4

It would surely absurd the Husband must always be a party to the suit when it is brot to enforce a right of his own. Fine illustrations. as when the Husband is "civiliter mortuus". the reasons of this are given under another Title. 3 Bac 631 / Laws 165.

The Coverture of the Deft is pleadable only as a dilatory plea It cannot be pleaded as a plea to the action. This is not a plea in Abatement as said by Ed. Kenyon. It differs from it in form and effect 3 Bac 361 / D° 631 / 4 Bac 44 / Cath 1244

And generally whatever may be pleaded

as

6 Mod 708 as a dilatory Plea cannot be pleaded to the action
This is not an universal Rule

1 Salk 310 And if a Feme Sole marries pending her
4 Bac 39 suit the Deft may plead it to the disability. How
ever if the time for pleading it as a dilatory plea
has elapsed it may afterwards be pleaded because
the exception arose after the former time of
pleading. In Court this rule is abolished by Stat
Stat 5 & 7 The Husband may appear & suggest the coverture
on the Record and go on with the suit.

6th Infancy. That the Deft is an In-
(5 Rep 119
Palym 290
3 Bac 1489 fant & sues without his Guardian or next-friend
3 Mod 301 is pleadable to his disability. An Infant cant
1 Just 135 appoint an Attorney because he cannot make a
Salk 123 power of Attorney. Nor can he sue but by
"Guard & Ward" Guardian or next-friend.

One more - It is said to be pleadable
Lawes 104 to the disability of the Deft that he "was not "in
3 Mod 301 esse". that the Deft is no such person "in rerum natu-
1 Bac Pal 44 ra". This objection should be taken rather to the
action because pleading to the disability admits
the Deft is in existence.

There are all the enumerated grounds of pleading
to the disability of the Deft

But if you conclude to the person of the Deft
3 Mod 303 & should except & say that the said B (Deft) ought
Lawes 109 to be answered "Lawes" makes a distinction be-
tween a permanent disability and a temporary one

In the former case the form is as above. in the latter the Plea should be "and the said A prays &c. wherefore the Pff may remain without day until &c" Laws 103.9 Tidd 585

IIII Of Pleas in Abatement

The word "abatement" in Law means frustration or annulation. As in the case of a Nuisance. To abate a writ then is to abolish it Bac Com 301-3 1 Just 134

Pleas in abatement extend generally to the Writ only. Mistakes in the Count or declaration are to be attacked by pleas of a different kind. Bac Com 301. 1 Bac 15 Salk 298 Carthew 172 3 Lewis 351-4

This rule tho generally is not universally true. It is universally true that a plea which goes to the Writ only is always a plea in abatement but e Converso it is not universally true that a plea in abatement cannot extend to the declaration for if there is a misnomer in the declaration, or a variance between the writ and declaration, abatement may be pleaded. 3 Bac 624 Bac Com 361-3 Laws. 105 5 Mod 132 Dº — 144 1 Com 43.30 4 Bac 8

And in Court we have a practice of pleading in abatement to a variance between an instrument declared upon and the description of that instrument in the Declaration

In Court there is not the same distinction between the writ and declaration as in Great Britain

In Court the Writ consists of that part of the record which includes the Statement of the facts or cause of action. Indeed the Writ com-

prises.

contains all that part of the record from its beginning to the statement of the action.

"Recognizance" - Commences the Declaration which contains the statement of the facts. The date is common both to the Writ and Declaration.

The signature of the Clerk of Magistrates to the recognizance for prosecution and the certificate of the payment of the duty all belong to the Writ. These you will observed are no part of the Pleadings

In all pleas in abatement the greatest precision and accuracy is required. The reason of this is pleas in abatement are not favoured, they are dilatory in the Law, they do not affect the cause of action, but only the form in which the claim is prosecuted. Hence the least inaccuracy in a plea in abatement is fatal. It is said it must contain certainty to a certain extent in every particular, i.e. there must be the utmost certainty in it.

3 Keb. 185 D
5 Mod. 284
Lawes 85 D.
2 Ld. Ray. 1134
Com. Dig. Abat. I. 21
Mod. 8 11
8 Mod. 167
2 Mod. 530

Causes of Pleading in Abatement

These causes are very numerous both in Great Britain and in Ireland. These causes may be either intrinsic or extrinsic i.e. the exceptionable thing mistaken &c. &c. may either appear on the face of the writ or it may be extrinsic.

II *Misnomer* and want of addition are grounds for pleading in abatement. And

And first as to the Defft. A misnomer as to a Defft is Cause of abatement. and this whether the mistake is in the Christ'd Declaration. A "misnomer" is a misnaming of the Party in giving him a wrong name

3 Bac. 824
Salk. 7.
2 Roll. 302
1 Sid. 247
6 Mod. 165
3 Bac. 817
Laws. 102-3
3 East 167

So also is the omission of the Defts addition a Cause of abatement. The addition of a Party is a description given of him in addition to his name to identify him more clearly. This additional description is called his addition. It consists in his title, trade, state or profession & place of abode. Thus if an action is brot agst B it is not enough to call him B his addition must be given him. If he is a Knight or Esquire he must be so described. His Trade also must be given him as Merchant Tailor &c. These are required by the English Statt of Henry 5th called the Statt of additions for the sake of obtaining more certainty. The CL did not regard all these additions

3 Bac. 824
Salk. 7.
2 Roll. 302
1 Sid. 247
6 Mod. 165
3 Bac. 817
Laws. 102-3
3 East 167
3 Bac. 822
Laws. 100
Cobbs 371
6 Mod. 165
East. 14
2 Roll. 302

The Statt only relates to personal actions & Appeals and indictments and not to Real actions they continue to be governed by the rules of the CL. The reason of this is in actions Real & mixt the action is brot agst the Party in possession of the subject in dispute. His possession was sufficient to identify him sufficiently

3 Bac. 818.
6 Mod. 85.

And as the want of addition is pleadable in abatement. so is a mistake in giving him his addition pleadable in abatement. As if a Knight is called

2 Roll. 302
2 Bac. 1017

called and Esquire it is pleadable in abatement
1 Com. Dig. 28. the uncertainty due this is much greater

In Cont. the only necessary addition
in common cases is the Dest. place of abode.
But when he is sued in his Civil or Official Ca-
pacity where the official capacity is endowment
to the action. that is necessary to be added here as
well as in England. This however is not to identify
the person. it is only to shew the character in which
he is sued. This is not then strictly an addition con-
templated by the Statute. So if an Heir is sued for a
Debt due by the Ancestor. he must be declared
agst as Heir. for he is only liable as Heir. So
if Exor is sued as Exor or Admr he must be declared
as such. So if a Plaintiff is sued as such he must
be described as Plaintiff. This is also the case as to
all other officers liable in their official Capacity

But where an addition by way of Ad-
dition or Nickname is unnecessary. it is mere surplusage
and therefore a mistake does not vitiate it. The
maxim is "utile per inutile non vitiatur"
2 Bac. Abr. 333
2 Mod. 333
3 Bac. Abr. 821
Eq. A is sued for a Debt of Testator himself
self and is declared as "Heir of &c." This descrip-
tion is surplusage and useless and therefore if he
is not Heir of &c. it can do no harm

The misnomer or want of addition in
one of two Defts is not pleadable by the other
Bobart 926 Advantage can be taken of it only by him who
Salk. 7. 30 is misnamed or whose addition is not set out

be

because the person who is misnamed may waive 4 Bac. 38
it if he chooses and the other Defts can make
no Comn. plaint.

And did rule it the same in 2 Hale 177
Criminal Cases where two are regularly indicted.

A question of this kind has been raised viz
if one of two Defts is misnamed and he pleads
it in abatement does the writ abate "in toto" Cath. 90
or only as to the person misnamed? This 8 Coke 154
question has not been settled. In the discussions 3 Bac. 925
to be found in the Books no mention is made 1 Com. 79
of a consideration which appeared to me to be 4 Bac. 45
the criterion. It is this - If the Cause of action
is joint and joint only it must abate "in toto"
If it is joint and several it need not abate
only as to the person misnamed

When a Deft pleads a misnomer or want
of addition and in general he who pleads in a-
batement at all must (as the expression is)
give the Pff a better writ. He must point out
what the writ ought to contain. He must
shew a mistake and shew that mistake is how
misapplied. This is no such thing as this in pleading
to the action. For if one is sued by the
name of J S he must plead more than that
his name is J S he must plead his surname
This is required of him as a condition. So if he
is described as an Esquire he must shew his title
that the Pff may know on what title to sue
him. So if one of two joint Defts is not sued
he

Esp. 303. he must not only state that he and another person
Str. 1330. 515 are liable jointly but he must state who that
Willes, 554 person is
2 Ld. Ray. 1178

and he must so state it. He must
not only plead that his name is J. R. and not J.
but he must aver that he was called by the
Willes 554 name by which he was sued at the time of
Lawes 39 issuing the writ, because a person sometimes has
(2) 103 two names. It is not indispensable that he
Salk. 5, 6 should be sued by his Christian name, for
2 Ld. Ray. 1118 if he had another name and was called by it
(2) 244 & the name of the writ he may be sued by it
4 Mod. 347 and it is not sufficient that he was known & was
3 Bac. 624 called by such a name. But it must be was called
Sheriff 625 by such a name at the time of the writ issued
against him.

And if a defendant to an action, instead of making
exception in his plea that he
Lawes, 92 is not the person named in the writ, will be bad. If
5 Str. 487 this is done by implication, "as the said A. B." he
is bad. He must admit himself to be the
person sued, but must deny that he is sued by the name
of A. B. or make the advantage to be taken of a mis-
nomer by a plea in abatement only. If it
Bull. 180 avoids a nonsuit it may be taken advantage
Salk. 124 of in some other way. But this would not be
Salk. 2 a misnomer in debt. If he omits to plead in
3 Bac. 623 abatement he waives the misnomer, for a mis-
Comb. 188 nomer is no ground of error. And if a man is sued
5 Str. 700 by a wrong name he must be sued by his wrong
is to read the misnomer the
misnomer the
name &c.
2 Ld. Ray. 458
Willes 491
Salk. 8

name

name and &c. must issue under the same name
and the right name can come in under an "alias" Stry. 1218.
This does not seem to me to be the proper 3 Bac. 617
mode of pleading. The only proper way is to sue 1 Salk. 210
him by his right name, and aver that he exe- 3 Bac 614
cuted the instrument by another name. This 2 Mer. 410
averment is necessary to prevent a variance 2 Wms. 273
There says Wigram uniformly accepted this course without any exception taken and I am satisfied in this opinion by a note in the 3 Bacon 610 when a grant is put &c &c Wd
And the writ should always describe all 8 Ves. Jr. 508.
the Defts. by their proper names, except in the Leach 240
case of Corporations aggregate. All who are
jointly liable ought to be sued, and by their * As the name of a Firm is often fictitious. Wade
respective proper names. The subscription name of
a Firm is not sufficient.* Now in an action
agst a Firm you must describe all the persons
composing that firm.
This is not true of Corporations. It is
true only of natural persons. Corporations must Leach 244
be sued by their Corporate name. A Corpora- 1 Bl. Com. 467
tion is a legal ideal entity, & all the members
of a Corporation are named it is bad
Formerly it was held that if the mistake Co. Litt. 3
was in the Christian name it was fatal, but 5 Co. Rep. 43
if in the Sir name it was not. This grave distinc- Stry. 1218
tion has not obtained in Court, and it is thought Wms. Saund. 5 544
would not now be considered as Law in Great Britain 3 East 111
Nor D 13th.
When a Deft is misnamed he need not for
his own benefit take advantage of it, for if he is Stry. 1218.
afterwards sued by his right name for the same 4 Bac. 38.

Cause

3 Bac. 625 Cand. he may plead the former Judgt in Bar.
80 Rep. 508 and aver that he is the same person and in the
former action and that the suit is for the same
thing.

1 Com. Dig. 14.18 Misnomer of the Plff. This may be
5 Bac. 617 pleaded in abatement. This is a rule of the Law,
The want of an addition is not
in most Cases a defect at Law
A replication by the Plff that the Defft was as
well known by the name by which he sued
1 Car. 542 as by the other name is good, and if it is true or
denied by the Defft will answer.
But any addition in the Plff is not
3 Bac. 617 pleadable in abatement except at Law. At
Com. Dig. 184 Law if the Deft was as high as the Plff a Knight
2 Roll. Rep. 495 he must have had his addition. The writ is not
1 Com. Dig. 85 good, place of abode must I think be inserted.
Tidd 591 It is said and held that there is no great dan-
ger of the Plffs being mistaken. At any rate
the Case of the Plff is not within the Stat. of

Note 14 Henry 5th.
4 Bac. Ab. 38 M. C. L. a misnomer was not pleadable to an indictment or Felony at the Suit of
1 Hale 243 the Crown. Standing at the bar with his unlifted hand
1 Chit. Cr. L. 170 was made sufficiently certain
2 Do. 238 This is now altered by Stat. Henry 5th Cap.
Geo 4th 104 5 and reaches to indictments
1 Dod. Cr. 58
2 Hawk. 180
Cl. L. 238, 170 In C. L. the right name must be inserted
as the law has not adopted the rule introduced in the

the stat. Henry 5th in personal actions. This
however can do no good because he is in the custo
dy of the Ct. and they will not discharge him but
shall him in custody until another indictment is
drawn.

Respectfully &c. when the Defts can ap-
pear by Attorney it would be absurd to plead a misnomer

II Coverture And the same of Abatement
is the Coverture of the Deft. The general rule is that 1 Burr 132
a Feme Covert cannot be sued alone and when she 4 Bac 39.
is sued alone she is considered as a Feme Sole tho' 1 Sedgw 140
her husband be actually living.

But if a Feme Sole being sued marries 4 Bac 9.10
"pendente lite" the suit does not abate on this ac 1 Salk 3 23.
count because it would be to defeat the suit by Keyl 81 a 811
her own act. The suit is rightly commenced, the Cro Eliz 1625
right of the Deft has attached and she shall not Ca. Ch. 328,
be able to defeat it by her own act.

If a Feme Covert when sued would take ad- Salk 24
vantage of her Coverture she can do it only by a Lutw 23
plea in Abatement. It cannot be taken advan- &c. 1178
tage of by her if she pleads to the action. If she does not 4 Bac 29.39
plead in abatement she waives her objection

Says the Coverture is pleadable in bar. This is not
correct (i. e. they think)
-the duty of it is Com
mon. and the Books
are contradictory.

But tho a married woman when sued alone does not plead it in abatement and thus
cannot thereby take advantage of the defence after
wards, yet her Husband may come in and plead
her Coverture in bar in any stage of the proceedings

and

3 Keb 631
Ibid — 681
Salk 400
5 Cawfen 133
4 Bac Ab 239.
Salk 24
4 Bac Ab 10
Stiles 354

and it he dead not do this and Judgt is rendred agst him he may take writ & may reverse it on a Writ of Error. The reason of this is the Wife cannot destroy the right of the Husband by her own act. of Course her coverture does not affect his rights so that he cant take advantage of them

The writ of Error is founded upon an error in fact. It does not appear on the Record for there is supposed to be no plea of Coverture. This is a Writ of Error "Coram vobis" i.e. before the same Ct. which tried the action

The Husband and Wife must both join in this writ of Error that it may be known that she is really a Feme Covert and Covert of the Husband claiming a reversal of the Judgt

3 Keb 10
Ibid — 19.

And it a good cause of Abatement that two Pltfs bring, or two Defts being sued as Husband and Wife are not in fact Husband and Wife This is an action is brot agst A and B Husband and Wife it is pleadable in abatement that they are not married

Lawes 105.

But it is no Cause of Abatement that the Defdt is an Infant and that his Guardian is not summoned to appear and defend. The regular Course in England in such a case is to appoint a Guardian "ad litem". In Court when the Infant has a Guardian appointed he can sue by Father, who is his natural Guardian. It is regular to be summoned to appear

5 Coke 53 b
Pract. Reg 89
2 — 135
5 Bac — 149.
3 Com Dig 427.

appear and defend. And the Court is to give the Pltf time to Summon in the Guardian. If the Infant has none the Ct will appoint one "ad litem" as the Cts ordinarily do in England

So the Pltf in such case may have him summoned in. as Judgt would be erroneous if recorded agst the Infant solus or without notice to the Guardian.

That an "Alien" who is sued on the Bond of his Ancestor is an "Infant" is no Cause of Abatement, — nor is it any defence to the action. When he is sued on his own Contracts he may generally defeat them by the Plea of Infancy. But he is sued on the Contract of his ancestor. In this Case the rule of the C. Law is that the Heir shall answer & is supposed wise & shall be staid until he attains full age[†]

4 Cook 485
Laws, 165
[†] Because in Consideration of Law an Infant is not able to take Care of his own Estate & the Infant has no property of his own to answer that Obligation &c

And in Court we have a Guardian ship known to the Law of England. Hence our Statute the Selectmen of the Town under some Circumstances and the County Ct under others may appoint in one Case Overseers, in the others, Conservators to certain persons who are not able to take Care of their property, who thus become Guardians and during the time of their Conservatorship the person is not liable to be sued alone. But he if he is not joined it is no Cause of abatement, in the first instance, for the Ct as in the former Case will grant time to Summon him to appear and defend.

Kirby 174

∥ ∥ ∥

IIII Another cause of Abatement is the Death of Parties. At Com. Law if a sole Deft or sole Deft died pending the suit it "ipso facto" abated. There was no rule established for continuing it after that time

1 Com. Dig. 5. 0
1 Inst. 139.
4 Bac. 40-1
10 Coke 134
Geo Eliz 982.
1 Bac. 7
* non the less after trial and before Judgment Ray. 403

And if one of several Defts. died except in Personal actions after Summons and Severance, the suit abated.*

A Summons and Severance is when one of two persons having a joint right refuses to join in the suit for its recovery the same can the other may sue in the name of both and Summon him to appear and if he does not appear the Ct will sever them and enter it on the back of the record when the party prosecuting may proceed as tho he were alone.

But if in a Personal action there had been a Summons and a Severance, and the person severed died his death did not affect the suit.

In Real actions there was no exception

The reason for this difference between Personal and Real actions in this particular cannot be easily understood. It is this. that by the death of one in a Real action the extent of the Survivors right is increased. So it is in Personal actions

10 Coke 134
5 Co. 20
1 Bac. 7
Tho. Ray 403

There is a technical reason. but it would take too much time to enter into an explanation of it in this place.

But it was a general rule even at C.L. that if one of two Defts died pending the suit it

it shall not abate. But in such case the Plff was to make an entry of the deceased Deft. and proceed agst the survivor

1 Bac 8
1 Shower 180
3 Mod 249
Hardw. 151

If had been in such a case as this the Plff shall take Judgt agst both the deceased and survivor. the Judgt would be void in toto. These were the rules at Com Law.

Barth 149

But now by the Stat. 17 Chs 2nd and 8 & 9 of Wm 3rd in England, and in Corpn by a like can Stat. the inconveniencies by the death of parties are in a great measure remedied. Upon the Stat. if one of two Plffs dies pending the suit, the suit does not abate if the cause of action is such as would survive in favour of the survivor* As in the case of two joint obligees, or when the joint rights of two or more are violated.

* As to what would survive, and what not see Contracts and Actions and Actions

So on the other hand when one of several Defts dies pending the suit, the suit does not abate if the cause of action be such as would survive agst the survivor*. In either of the cases if the death of the deceased party is suggested on the record the suit will proceed. This must be done. else Judgt will go agst all, and it will be erroneous.

4 Bac 42
2 Mod 115
1 Com. Dig. 545, Action
St Com 223

* So far in this last case the Stat. are in affirmance of the Com Law.

And under this Stat. if a sole Plff or sole Deft. dies pending the suit, it does not abate if the cause of action be such as will survive to or agst the personal representatives of the deceased

This rule does not obtain in England unless

4 Bac. 42

the

the death of the party happen after the same in like manner as Judgt obtained

In Comm. it makes no difference the rule
St Cornh 22 prevails in any stage of the Suit, tho no Judgt has been obtained

The reason of the rule as it is in England I suppose to be, that any intermediary Judgt supposes both parties to have appeared

* So prac. 4 Harcastle of Sole Deft Sole Plff die before May Sey post the death & shall not proceed against the Exrs of the Deft

In these last cases & in those a Sole Plff or Sole Deft dies, if the Sole Plff dies the Exr or Admr may enter and prosecute the Suit by suggesting the death of the Plff on record *

If a Sole Deft dies the Plff must do some thing more than suggest the death of the Deft on the record, he must have a Scire Facias agst the Exr or Admr to shew Cause why Judgt shall not go agst him. This difference is perfectly proper and reasonable

It is to be observed however that our Statute relates only to Suits in the Supr Cts and Ct of Com Pleas, therefore before a single Magistrate the rule of the Comn Law must prevail *

* Believe the Statute has in Construction been extended to them by Comn Law Courts

But there are Suits properable Cases for which the Statute do not intend to provide * in those and other intermediate times pending the Suit. What is to be done with this Suit &. In my opinion in the first instance it survives to the Survivor, in the second place it survives & shall go to his Exr

* Do I think the 4th application

Suppose

Suppose two Defts die at different times pending the suit the same Cause must be pursued. If survives in the first instance agst the surviving Deft, and then agst his Exr or Admr. This can only be true when the Cause of action survives in favour agst the survivor.

In these Cases the Exr of the last surviving Deft is answerable to the Exs of the other Deft, for their share of what he recovers. And the Exrs of the Deft are liable to the Exs of the last surviving Deft for their proportionate share of the Debt which has been recovered agst him.

Real actions abate in most Cases, upon the death of a sole Deft or sole Deft. They remain as at Comn Law because the Feoffee does not affect real rights. The Statute speaks of actions surviving agst Personal Representatives not of the Heir. Remainder man or reversioner. It relates only to Personal actions.

But Real actions where there are several Defts or several Defts are within the Statute — Hee it does not mention Personal Representatives but the surviving original Party. Hence the action wise not abated by the death of one. if the Cause of action be such as would survive in favour of the surviving Deft in the one Case and agst the surviving Deft in the other.

4 Bac Abg 1 Co Litt 89 a 1 Wms Saund 179

It was ruled in the year 1800 by the Supreme Court that petitions for new Trial are within

and

own Statute book Stat. make use of the expression "all actions" This Judgt was affirmed by the Supreme Ct of Errors June 1803, and yet the Statute was made long before new Rules were known here and Bulkley Judge Baldwin & Gould & Caverno tried & Court. The Case was Noon vs Bates agst Griswold in parties in Debt &c.

* The Clerk of Litchfield may for aught I know make use of the Seal of the Supreme Court of Errors as the Seal of the State

IV Variance

Sydenham 5 Wms 249 Ld Raym 84 Do 434 Salk 133 Ld Raym 121 Do 185 Do 198, 322 Sydenham 126 Mod 279

In the first place if the declaration vary from the Writ it may be pleaded in abatement. It is said that when the Declaration itself abates the Writ,

and it is said generally in the old Books that where the variance is in favor only, no advantage can be taken of it only in Abatement But the Variance is in substance this place in which it may be made is immaterial for Judgt may be arrested after Verdict, or the Court ought to dismiss it.

2 Wilson 394 Willes 240 Salk 701 Do 658

In Wilsons Reports have seen the Chief Justice intimates, that the latter part of the rule is not the practice* for the Variance he says must always be pleaded in Abatement. And this opinion seems to be supported by others.

* He means that the Court requires Bonds to be given in such cases only the practice differs in different Counties

A variance in point of form consists in such a mistake as that of giving the Deft a different name, addition &c in the Declaration from that in the Writ. Variance in point of

of substance consists in giving the Plff a different title, quantity of interest &c in the Declaration from that in the writ.

Again a variance between the instrument, & an action the description of the instrument in the writ is good cause of abatement. Thus if the writ states a bond of 100£. and it is found to be a bond of 50£. it is a variance pleadable in abatement. These variances as you have seen are numerous. Where is a misdescription it is a variance.

Whilst the variance is between the instrument on which the action is founded and the description of it in the Declaration. The usual mode of taking advantage of it is by pleading the Gen. Issue and objecting to its being given in evidence. So the Stay and Thus working a nonsuit.

In Covt. on the other hand advantage is taken of it by a Plea in abatement usually. This altho it is not necessary may be done. It may be taken advantage of thus in the same manner that it is in England i.e. in evidence under the Gen. Issue.

It is said by Comyns and I presume it is Law. that this may be taken advantage of in England by plea in abatement

With regard to this kind of variance advantage may be taken of it in either of four different ways. viz 1st By plea in Abatement* 3d By objecting to its being given in evidence under the

Doug. 640
Peaden 84
Cooke 14
2 Wilson 282
Lawes. 106
4 Rep. 34
Do - - 612
Yelv & Pull 67.
13 Rep. 656
Comyns 5 E 12
1 Rep. 85
Doug. 640
1 Bos & Pul. 7
Com. Dig 706-7
1 Saund. 154
4 Rep. 68-80
Com. Action 10-2
Stat. 5 E 1
6 Debna. Ra-
ctmd. 1
Pack. 65

1 Com. 44

* 2d the evidence under the Gen. Issue with Imp.

the

Lawes 351
D° — 99
Hobart 18
6 Rep. Digest
Lunch 237
Note 15.
1 Salk 154 pl.
D° — 31
1 Bl. R. 313
Doug. 258
D° — 213
2 Str. 1140
2 Wilson 339
Burr. 1082

the Gen. Issue. 4th By pleading over of the instrument praying it may be read and then demurring to it.

But the declaration cannot be amended after pleading the surname when found after over, and the objections which can be made to this must be made to the Declaration itself as it stands and what originally appeared upon its face the Declaration is good before any over and this cannot vitiate that.

4 T.R. 612
1 D° 656
* i.e. in either of the ways above mentioned or under the Gen. Issue

Misnomer as such must be pleaded in abatement. But if in a written instrument misnomer occasions a variance it may be taken advantage of as a variance.* But if it then not treated as a misnomer but as a variance

V Another cause of Abatement is the non joinder or misjoinder of parties. Under a former division of this subject I considered what things might and what might not be joined in one declaration. and also what parties might or might not be joined in one Writ. I am now to consider the ways in which advantage is to be taken of these defects. The general Rule is that if one person and alone who should ought to be joined with him the non joinder is always pleadable in abatement. I am now to speak of the non joinder and misjoinder of partners &c.

1 Salk 164 a
D° — 187 a
2 D° — 195 b
3 D° — 198 a
5 Salk 64 b
1 Lev. 291
1 Com. Dig. 10, 11
1 Str. 263

The Gen. Rule extends to all cases of Torts. as

well as to Contracts in fact to all actions whether
real personal or mixed. Thus if one of two Joint
Tenants bring an action for an injury to their joint
Tenancy the omission of the other is pleadable in abate-
ment. So the rule is the same when one of two
joint Obligees Promisees Covenantees &c. and sometimes
in the Case of Tenants in Common. —

As thus far on the one hand when there
is a non joinder the mistake is pleadable in
abatement, so on the other hand if several and
when the right of action is in one only this mis
joinder is pleadable in abatement. If A executes
a Note to B and B and C bring the action upon it
A may plead in abatement to it.

This rule then you see is general and extends
to all Cases. Viz that the mistake may be pleaded in abat

But further. If in an action on Contract
either one sued alone when several ought to
join it may be taken advantage of under the
Gen. Issue as well as under a plea in Abatement.

On the other hand if two or more sued
on a Contract when the right of action is in one
only advantage may be taken of it in the same
way. He may plead in abatement because there
is a wrong joinder or misjoinder and he may take
advantage of it under the Gen. Issue because the
Contract sued upon is not the Contract declared
upon. The evidence does not support the Declara-
tion as when A. makes a Contract with A only

Co Litt 9 b 3
Hobart 72
1 Saun 153
1 Rolle 294

Hobt 72
1 Leonard 315
1 Saun 153

When one of a
firm has with-
drawn from the firm
but there remains
part of the partners
he need not join
See
1 Esp Rep 408

A.

2 Stra. 820 A and C being an action on this Contract a gift
1 Bac. Ab. 75 of J.S. The averment that A made the Contract
2 Str. 1282 with them both is not supported and therefore
3 T.R. 149 152 advantage may be taken of it under the Gen. Iss.

The Deft may also in this case (& of Con tracts) take advantage of the non. or misjoinder in another way. He may pray oyer of the Contract when it is a written one, & plead it & the record and then demur to it. This is only true of written Contracts for you cannot pray oyer of a verbal Contract. This can be taken advantage of only in the two ways before mentioned

1 Bac. Ab. 75
1 Saund. 153.
2 Ld Raym. 1291. Budd,

And if in an action on Contract, one
5 Coke. 18 does when another ought to be joined and this
2 Stra. 946 appears upon the face of the Declaration (when
Salk. 32 it could be joined) the mistake is fatal and
Ld Raym. 301
Cro. Jac. 647 and is not aided even by a Verdict.
Salk. 32 (But in Torts it is otherwise. The mistake is not fatal)
6 Mod. 766.

* Vide supra
* other readings of this Pl.

The reason of the difference in the two Cases is this. In the case of Contracts there is no Cause of action appearing on the face of the Declaration. In the case of Torts after Verdict as it appears one has done the wrong it makes no difference whether any one has assisted him or not, or whether the right violated was joint or not.

And in Actions framed in Tort, if one
Salk. 390 does alone when others ought to join the mistake

must

must always be pleaded in abatement and no advantage can be taken of it under the Gen. Issue This is the general rule.

But if two sue in Tort where the right of action is in one only, advantage may be taken of it under the Gen. Issue. So advantage of the non joinder can be taken under the Gen. Issue because the party has an interest. The Deft has done a wrong. But in the other case where the defect is in the misjoinder advantage may be thus taken of it. Because he in whom is the right of action embarks his rights with a Stranger with he cannot communicate. The objection then here goes directly to the merits of the Case The Deft may truly say. "I am not guilty" - I am not bound to answer to a Stranger

The Court rule (when) there has been a misjoinder) has been ruled to be Law in an Assp. Ct in Fairfield County. A.D. 1805 "Lasey vs Barnes."

And if one part owner of a personal Chattel sues alone for a Tort and no plea in Abatement is given in and thereby the defect is waived so that Judgt goes agst the Deft. the other part owner may afterwards sue alone for his part of the damage sustained

Thus far of the non joinder and mis joinder of Plffs. As to the non joinder or mis joinder of Defts some distinctions are to be observed. If one of two joint debtors liable on Contract is

Stag. 820
Do. 1140
1 Saund. 291
5 Rep. 100
6 Do. 549
5 Bac. 260
6 Com Dig. 143
Asp. Dig 143

5 Bac. 260
6 Com Dig. 143

7 Peters 729
Do. 271
1 Peters 118
2 Do. 585
Do. 632
The marginal notes are in the same hand as the main text.

1 Vent. 34
2 K. 86 / 947
5 Rep. 65.
6 or 12 Co. 32.
Co. ... 369
Cases in 832
1 Mod. 234
1 Sand. 291
5 Coke 119
5 Bun 2611
Leading Cases
2 Saund. 400
Co. 365
6 Coke 52.
6 Rep. 76
Comyns Dig. 440

Dig. 440

* The same is the case in actions arising upon contracts implied by law. Contract. 2 Mod. Rep. 74. So in actions upon the case for nuisance. Mod. Cases 230. 1 Sand. 291. 5 Coke 116. 5 Bun 2611. Leading Cases 402-3. 2 Saund. 400. Co. 365. 6 Coke 52. 6 Rep. 76. Comyns Dig. 440. Dig. 440. 4 Co. 32-3

aliter the Gen. Issue (page 109)

and to the general Issue (page 109).

1 Saund. 291 - 5 Coke 119 - 5 Bun 2611 - Leading Cases 402 - 2 Saund. 400 - Co. 365 - 6 Coke 52 - 6 Rep. 76 - Comyns Dig. 440

is sued alone the non joinder must be pleaded in Abatement or it is waived. In the case of Executors you have seen the rule to be otherwise. For the advantage may be taken of the defect by a plea in Abatement, and is however one exception to this rule for it appears from the face of the declaration or any other pleading on the part of the Plff. that another person ought to be joined the mistake is fatal to the declaration and can not be cured even by Verdict *

Formerly this rule of that Abatement must be pleaded was otherwise. It might have been taken advantage of under the Gen. Issue. If you consult all the authorities both ancient and modern, you will find it difficult to reconcile them all The modern authorities however have completely settled the point

Suppose then A and B execute a joint Bond and A alone is sued he must plead the non joinder in Abatement, for if he plead the Gen. Issue he pleads that it is not his act and deed, but it is his act and deed. Tho it is not his sole act and deed. So in the case of joint promises. The one would plead that he did not assume and promise, but he did assume and promise. Tho not solely. The reason of this rule as applicable to joint Contracts is obvious. Tho frequently dormant partners in a house but if the active partner only is sued on the Contract, in this plea of Abt.

Abatement he must discover all the parties. But if he can plead the Q. Eff and he would be obliged to discover no more than one, but need to avoid the Suit. which would be subjecting the Defft to great inconvenience

And in these Cases where one is sued alone when others ought to join. if another action is brot. and a new Defft is joined he may plead that there is another that ought to be joined. The man who is first sued can never plead again that there is another who ought to be joined. It belongs only to every new Defft 3 Car 470-1

But if it appear upon the Declaration or any other pleading of the Plff that another person was jointly bound with the Defft and that person is amenable Cas. if he is described as in being the non-joinder is an immaterial defect and Judg may be entered after a Verdict for the Plff. If this does not appear advantage can be taken of it only by a Plea in Abatement (as was shewn above) 5 Bac 20 4 / Vent 34 1 Sanders 64 & 291 6 Ca 4 Bac 1-745

With regard to Defts in actions sounding in Tort there can be no objection taken either by a Plea in abatement or otherwise. For all Torts are in their nature joint and several The act of one is the act of every other person one or all may be sued. Consequently it never can be objected to an action sounding in Tort that the Defft and another is jointly liable. There is no joinder about a Tort 8 Coke 150 Sty 1. 420 1 Sanders 291 5 Bac 162

And

And on the other hand if one of Commits a Tort alone and others are joined with him the Court object to it. because the others may shew themselves innocent if they can. But in Contracts all or none are liable. A mover must be has or that as stated, or not at all

5 Esp. 420.
2 C. 509. 993
8 Com. Dig. 156
5 B & C. 549

There seems to be an exception to the last rule. where the action concerns the real property of the Defts It is said by Ld Kenyon that where one of several persons is sued in Tort when the cause of action affects the real property of him and another the action is not rightly brot. Thus A and B are owners of Land and he is bound by tenure to repair a way. A is sued alone he may plead that B ought to have been joined

5 Com. Dig. 651
1 Saund. 291 a
2 Hen. 182
Com. Dig. Abatement E. 6
Tenants in common or joint tenants of a joint duty and there is a covenant by all or several of them to do it

When the Contract is joint and several it has been observed that one or all ought to be sued, but that two of those persons jointly and severally bound cannot be joined. With regard to taking advantage of this latter rule the rule is the mistake must be pleaded in abatement. No advantage can be taken of it in any other way.

1 Saund. 291 a

Thus far we have treated of non joinder of mistaken Defts.

On the other hand if two or more are sued on Contract, when one only is liable, advantage may be taken of it. under the Gen. Issue. A and B make a joint promise, but the

the Pff brings his action on the promise agst
A & B and C. C never made the promise. The misjoinder may be taken advantage of under the Gen. Issue because the evidence cannot support the Declaration. And the Dft may demur to the misjoinder

1 East 48
2 Wms Saund 454
2 Day 272
by which Dr. Pff is to recover one in addition to the Joint Debt. Phillips Reps 47. infra

In Contt this has been ruled to be Law in the case of Phelips vs Battle

And it seems that in such a case as this if the Jury find a Verdict agst him who made the contract and in favour of him who did not make it Judgt may be entered by him agst whom the Verdict is found because the Contract in the Declaration is negatived by the Verdict #

3 East 62
Cas Pl 301
#. Observe in an agst 2 on Contt Pff is in any way bound as to one of them who otherwise may avail the Judgt in the Declaration but a joint Contract by the Jury can also not one only be

These distinctions are extremely important in practice. hardly any branch of the Title of Pleadings is more necessary to be understood.

1 Tidd 284

VI Another Cause of Abatement is the pendency of a prior Suit for the same thing between the same parties. It is a legal maxim that the Law abhors a multiplicity of Suits and this rule is made to prevent the Pff from harrassing the Deft with Suits. No man having commenced one Suit well settled to his Cause of action can commence another for the same Cause agst the same person and if he does the pendency of the former is pleadable in abatement to the latter.

1 Bac. Ab 18
4 Dr — 48.

This rule (as it clearly includes) applies only

only when the suits are of the same kind or at least concurrent or the cause of action the same in both. It is not necessary that they should always be of the same kind for many actions are concurrent which are not of the same kind as Trespass and Trover frequently.

5 Coke 61. a & 62. Hob. 184. 4 Coke 43a

But the two suits are pending between the same parties and tho the cause of action arises from the same transaction & out of the same fact yet if the thing for which the action is brot is not the same the one is not pleadable in abatement of the other. Thus in the case of a Mortgage where Ejectment action on the Bond or bill filed in Chy to foreclose may all be brot one will not abate the others because the objects of them are all different tho they all arise out of the same transaction

1 Com. Dig. Abate. 2d 3 Moore 448 Do — 539 Supra

And the plea (of the pendency of one suit for the same cause of action) is good tho the suit is pending before another Court

5 Coke 62a 4 Bac 48 2 Wilson 87. 1 Com. Dig. 49

In England there is an exception to this rule when the former action is in an inferior Ct because a Superior Ct may remove every action from an inferior by writ of Certiorari

Under the Laws of Conn. there is very little application of this rule for there are very few cases where the Cts have concurrent jurisdiction.

And for the purpose of defeating the latter suit it is not necessary that the former suit be

pending

pending at the time of pleading in abatement to the Scire. It is sufficient if it be pending at the time of Commencing the Scire. The Scire is always in this case. When Commenced during the pendency considered "ab initio" vexatious.

When the subject of this plea there has been a series of decisions in Cont. perfectly consonant to principle. tho' there are no precedents in the English Books

It has been decided that if the first is void by ineffectual. the pendency of it shall not abate the Scire. for it cannot be vexatious. Thus when process attacked by the first process is found not to be the property of the Deft. the Pltf. during the pendency of this may sue him on another attachment. The pendency of the former will not abate the latter. or suppose the process attached to be found to be of no interest of value the rule is the same. So if the first action is clearly misconceived. and not adapted to the case. the Pltf. may bring a Scire during the pendency of the first suit or action. Indeed the English Rule requires that the actions should be Concurrent.

Thus suppose an action agst. Biden. and the Pltf. should sue in Trespass. when Trover only would lie. if the Pltf. bring Trover during the pendency of the action of Trespass. his suit will not abate.

Indeed the very object of the rule is to prevent vexation. But in the case above there is no vexation. therefore Scire issued when the

Scire

1 Bac. 13
2 D. 49
Batina. Placitandi Jurge 10
* Whether this suit should be considered as commencing during the pendency of the former suit page 29 *

1 Bac 355
2 D. 502

Second is not vexatious the pendency of the first will not abate it

The pendency of one action of Book debt in Comm. does not prevent the Defft from suing the Pff during the time on Book for that may be cross suits between the Pff and Defft on Book

Stat. 130
Bl Rob. 155.

Each may challenge a Tallamen indeed in the original action the Defft may move if he is entitled to a tallamen. But our Stat precludes the Defft from Costs if he neglects to present his books for a tallamen to be made on the first suit unless he has very good reasons.

The pendency of a former suit for the same Cause abates the second suit a new Defft should be added. The better opinion seems to be that the suit will abate as to all the pties in the second. Thus if A B brings an action ags. A and before this is disposed of brings a second for the same Cause ags. A and B the first may be pleaded in abatement of the second

4 Bac. Ab. 49
Hob. 127
Cro. 137, 1 Roll 607
Cart. 96-7
1 Bac. 13. 14
Contra
Salk. 42
1 Shawn 71

On the other hand the one of the Defts in the first action is omitted in the second. the pendency of the first is pleadable in abatement to the second. and here the Cast must abate entirely without doubt. You will however remember if the first action should be miscarried the pendency of the former is not pleadable in abatement of the latter. This follows from the rules before given

To

To prevent the evil of speaking unjustly on this Plea it is settled that if the second action is commenced on the same day the first is abated, the second shall be presumed to have commenced after the abatement of the first so that the pendency of the first is not pleadable in abatement of the second The Law allows no fraction of a day for this purpose this is a presumption of Law not to be controlled. —

1 Bac. 44
4 Do. 46
1 Lyn. 34
Gilb. C. P. 260

But it is no cause of Abatement that another action for the same cause is pending against a stranger. The Deft has nothing to do with the pendency of this Suit

Stg. 420
Hob. 137-8

And it is no ground of abatement in criminal cases, that another and former indictment is pending agst the Deft for the same offence Courts of Criminal Jurisdiction have a kind of discretionary Control over Indictments. They will quash the one or the other as they think proper, generally the first. *

2 Hawk 190
Do. — 275
Do. — 357
* For indictment there presumed by the grand jury and the latter only can be removed, and the Ct and Counsel attend of the prosecution.

But in the case of informations filed by the Attorney General "ex officio" or presented by some inferior Ct. the Ct. has no such discretionary power The general rules with regard to civil actions apply in this case *

Sulpm 1 Bac. 13
* How an indictment is abated as to the Ct and informed it is like a civil case.

If two informations are exhibited by different informers agst the same individual for the same offence on the same day, each will abate the other and neither can proceed Neither of these parties can claim any justice for himself, the

Hob.t 138. Moore 864 — D.o — 865 1 Com.s 49. in this case and four more, pro tanto.

An Infamous is a mere volunteer and is entitled to no indulgence. The day is a "Juridical Stans*" and the Ct will suffer no proof to be introduced to shew that one was commenced before the other

VII The Writ having regularly issued, is another cause of Abatement. And it may be laid down generally under this head that any irregularity or informality in the writ is ground of Abatement

Laws 104 — D.o — 105 Com.s Dig.t Abt. (H) 1 Salk.a 1

Thus if the writ is made returnable to any other than the next Succeeding Term of the Ct to which it is made returnable provided sufficient time has intervened between the date and the Session for legal service

This writ is not only abatable but it is absolutely void for if the Deft was at liberty to pass over one of the next two and soon for 20 years. The Deft ought to have immediate relief Insomuch as the Law might be, he might be holden to bail for an indefinite length of time. Yet if there is not sufficient time for legal service the writ may be made returnable to the next Court but one

3 Atkyns 341 Salk.a 100 Ld Raym. 315-6

* If it were voidable she could not do any thing with it but the Defendant might waive and cure the informalities. Otherwise this would be monstrous.

So if the writ is not signed by proper authority it is abatable yet this need not be pleaded as it is an Instrument void and every person acting under it a Trespasser.

And in Cour.t where an Att.y makes it manifest that the duty should be satisfied, & that there is the want of this certificate of the payment

of

of the duty, the writ is not abateable. It is said.

1 Lyons 2
1 Show 80
1 Bac 43
Cro Eliz 592
1 Keb 304
1 Com. Dig. 40

A want of date or an impossible date make abate the writ; as the 30th of February. and in England the date cannot be amended

In Com. Dig. Pleader K. 2. given no decision on the subject of amending the date. But the County Act allows it to be amended in the case of Williams in Litchfield County.

A defective return is also cause of abatement. that is. if the writ is made returnable within the time limited for its return or within a shorter time intervenes between the time of service and the time when the Law requires.

Cro Eliz 50
Salk. 58
1 Sid. 400
2 Lutw. 25
2 Keble 457

In England the time limited is 15 days before the 4th in Westminster Hall. In Conn. 12 days are allowed before the Sup. and County Sts. 14 in case of foreign Attachment. and 6 days before a single Magistrate

1 Com. Dig. 32
Do 62. 188

So also if the return of the officer to the service is insufficient on the face of it. Both in England is a cause of abatement. But if the insufficiency of the return is not on the face of it. it cannot in England be embraced by a plea in abatement. The party is left in such case to an action agst. the Sheriff for a false return.

1 Dy. 8 13
Do 8 18
1 Keb 3 23

* Bac. Abr. Pleas. I. 2. is not to be in the writ itself. but only if Sheriff's officer is not a justice. he ought to show his warrant

But according to our practice in Conn. if the service be defective either as to the fact of

of it. or by any thing. which the Deft may plead in abatement to it. The indorsement may be contradicted for the purpose of abating the writ *

* The indorsement is no part of the record.

The omission of some requisites may by our Stat. does not have the effect of abating the writ. Thus if the Sheriff omits to leave a copy of the writ with the Town Clerk as the Law requires when he attaches Land this cannot be pleaded in abatement. The object of the Stat is to give notice to third persons of the lien upon the Land by the attachment, and the Deft. has no reason to complain if the Stat. is not followed in this respect * It is enough for him if he has had due notice.

Stat. 33 & 35 Geo. 3 c. 35

* Still it may affect the Land.

But if when property is attached by the Sheriff a copy is not left with the Debtor the writ will abate provided there is not sufficient service in any other way, in which case it will not abate, as if the writ be read to him. The effect would then be only this, that the Plff would not obtain a lien upon the property *

1 Root 54
2 Day 128, 503.
2 Root 130
3 Day 340.

* The Warrant may be proceeded on as a summons.

VIII The want of a Venue in the writ is a defect which is pleaded also in abatement. The want of a Venue in the Declaration is a cause of Demurrer. The word "Venue" in Norman French signified "neighbourhood" And it is used in Law to denote the County where the action is laid. It is used to the District where the ancient

C Law every action must be brot in the County where the cause of action arose. In local actions the rule is strictly adhered to but in transitory actions we have seen it is evaded by fiction. 5 Bac. 332 7 Rep. 243

As in transitory actions the laying the Venue is immaterial & form. it follows of course that if the Venue is wrongly laid it is no cause of abatement consequently it is not necessary to lay the Venue as it really is in matter & fact. For on motion may not be done in its discretion change the Venue tho it is seldom done. Yet a false Venue in transitory actions is no cause of abatement 3 Cask 329 2 Salk. 669 449 Carth 510 T. 3 Keb. 820 D° --- 245 Laws. 74 Lindsey 44 1 Com. Dig. 447 D° 117-18

But in local actions the Venue being matter of substance the laying of a wrong Venue is a cause of abatement. As it is "usual" "quare Clausum fregit" an action brot in the County of A and the Land described as lying in that County it is good cause of abatement if the Land lie in the County of B. Com. Dig. Act. H. 67 5 Bac. 34 7 Coke 2.3 Fo. Com. Law 1 Com. Dig. 34

The rules as to Venues are not the same in Conn. as in England because the rules of pleading in this respect are different. In Conn. in transitory actions it is not material even in theory what the cause of action arose. Because under our Law the action is to be brot in the County where the Pltf or Deft lives (below the Supr. and County Ct.) The residence of the Pltf & Deft determines the jurisdiction. If the action is against a single inhabitant of the Law the rule is the action must be brot

1234

Stat. 20, but in the Courts in which the Pltf. sues. This is analogous to the former rule. *

IX That the action cannot be abated by the death of the Pltf. in case when a man with a sound body and sound mind injures another and then dies, the action does not survive.

When the Pltf. is out of the State the action must be brought in the County where the Deft. lives and if the Pltf. out of the State sues before a single minister of the Law he must bring his action in the Town where the Deft. lives. Either writ then is defective in either of these particulars it may be abated.

In Local actions can only be brought by stat of the Com. Law. The action must be brought in the County in which the land lies. It is thought that the plea should go to the jurisdiction, and not in abatement.

X That the cause of action had not accrued at the commencement of the suit, is another reason for abatement. This objection may also be taken by plea to the action. It may be pleaded in abatement, because then it is objected in the writ.

It may be taken advantage of in plea to the action because it goes to the merits of the Pltf's claim.

And when this defect appears upon the pleading advantage may be taken of it by Demurrer or by a motion in arrest of Judgt.

I have now gone through all the enumerated grounds of pleading in abatement.

Cas. t. H. 71
2 Levinz 197
1 Saund. 39
2 Dec. 165
Holt 199
Lutw. 100
* Stat. limiting actions of Slander or under the Gen. Issue
Bridg. 114
Cro. Eliz. 335
1 Str. 147

As to the

As to the mode of pleading in Abatement and the effect of such Plea.

Pleas in Abatement regularly begin and Conclude to the Writ, or the Declaration as in the Case of Misnomer & to the Writ and Declaration and the same

The Conclusion is by praying Judgt of the Writ, and that the same may be abated or quashed

And this plea regularly begins and Concludes in this manner. Plea is to be understood a distinction taken between the form of the plea for an intrinsic and and for an extrinsic defect

5 Leon: 132
3 Mod 353

In the former Case it is said both to begin and Conclude in the manner above specified. in the latter Case that it only Concludes in this manner. This distinction however is not allowed and practised

Lawes 108-9
Do 109 & 110
Com Digest "Abatement" 12

The plea of Jointenancy Concludes with Writ but not always for sometimes the Plea goes to the person of the Party the Conclusion then praying Judgt whether the Defendt ought to answer

Vide 384 new Edition Lawes 106

And since the Writ is abated de facto it seems it would be abated without a plea. The plea Concludes by praying Judgt whether the Court will proceed further. Supposing the Writ is void and the Defendt pleads in abatement he Concludes praying whether the Court proceed further

Lawes 109

It is said in "Lucas's Rep" that the Chancr

of

11 Mod. 112 or Lucas 112
2 Ld Ray. 894
12 Mod. 524
4 Bac. 50

of a plea is determined by its Conclusion without regard to the matter of it or the manner of its Commencement This rule is the best for when the question is what ought to guide the character of a plea in abatement the rule ought always to be positive and the simplest is best. The above is the simplest

Dawes. 107.
D° — 145-0
2 Ld Ray. 893
Fitz. 384.
D° — 591

But according to Ld Holt the character of a plea is determined by the Beginning and Conclusion of it taken together This is undoubtedly true for the other and only Books to the Contrary to determined the Character

2 Ld Ray. 893
D° — 1018
4 Bac. 49
6 Mod. 103
4 Bac. 50
1 Vent. 130
3 Mod. 281

But Ld Holt says some further distinctions called arbitrary He says if the matter of the plea would be good in Bar Still if it begins and Concludes in Abatement it is a plea in abatement. or if the matter pleaded be only in abatement yet if the plea begins and Concludes in Bar it shall be so Considered and so if it begins as a plea in abatement and Concludes as a plea in Bar it will be Returned a plea in Bar or a plea in abatement according to the matter of the plea and "Vice Versa"

Further he says if the matter pleaded goes in Bar or in abatement indifferently if it begins in Bar and Concludes in abatement or "Vice Versa" the Court may Consider Bar as a plea in abatement or as a plea in Bar as the pleader shall and answer it accordingly The Judg. you say would be

The comment of Ld Holt in his comments to this 4th Rule is this 1st When the beginning and Conclusion are both alike that is both plea in Bar or both plea in abatement and the subject matter of the plea with the form suits both the subject matter— 2d When the beginning and Conclusion of the plea and the matter of the plea are not alike but the subject matter will admit of either the Character

be different in the two cases. 6 Do 57. 92

As to the forms of pleading. vide 3 Bac. Ab. 11. 553. D° 104-16

Laws. M. 104

But a plea in Abatement founded on matter which goes only in bar is not good and so "vice versa" a plea in bar founded on matter which goes only in abatement is bad. The offices of the two pleas are wholly distinct. "Otherwise there would be no distinction between pleas in bar & Abatement

1 Inst 128 a & b

12 Mod. 400.

1 Mod. 244

1 Raym 14. 86

But how the matter pleaded will go either in bar or in abatement, the party may plead it either way. Thus alienage in a real action may be pleaded in abatement or in bar

1 Mod. 244

4 Bac. Ab. 56

It is said by Ld Coke that a nullity in a fault in a dilatory pleas. but a flaw man may rule divers of them in their proper kind and place. and from this it has been holden that a man may plead two pleas in abatement to the same cause in the same part of the Writ. But this is not the true rule. he cannot do it. For he may plead the several kinds of dilatory pleas in their proper order. and this is the amount of the rule. — Thus he may plead to the Jurisdiction. then to the disability. and then in abatement. but he cant plead two of the same kind. as two outlaw ries. two excommunications. Deficiency in amount a fault in a dilatory plea is in any other.

Laws. 108

Hob. 258

1 Salk. 344 a

1 Ba. Ab. 15

Carth. 80

1 Com. Dig. 30

(Declining Pleas and Pleading generally. D)

When a Cause of Abatement is pleaded and Judgt is awarded upon it quod Writ cassetur upon it as well as upon a Judgt in Chief. but a Writ of Error will not

not be until Judgt in Chief has been rendered
2 Salk 705 because the Law will not allow a Party to bring
6 mo Eliz 544 a Writ of Error where Error may be assigned, no ne-
Carth. 124 cessity for it, for he may proceed in a trial on the
3 Bac. 151 merits. But a mere abateable defect is not
Dalt. Back. Ed. ground of Error, unless it is pleaded. It is also
Introduction 5 wise waived.

This is the case as to mere matter of abatement. But where there is an exception which may be taken in abatement going to the
2 Ray. 894 Cause of action, one which may be taken advan-
5 Viner 284 tage of in every stage of the proceedings. There
4 Bac. 39. the objection is not waived by not pleading in
2 Roll. Rep. 53 abatement, and therefore a Writ of Error will lie
tho there was no plea in abatement. Also in
the case of Covenant if not pleaded by the
Wife in abatement it may be taken advan-
tage of by the Husband at any time and Error
will lie if Judgt be rendered agt him in Chief.

And upon the same principle of waiver
Salk. D it is an established rule that to a "bad Plea"
6 mo Eliz. 383 on a Demurrer the Deft is not allowed to plead any
D° — 575 thing which he could have pleaded in the for-
6 mo Eliz 303 mer action *
* Vide 16 And so a Declaration may be good
Laws. 106-7 in part and bad in part. So may a Writ also
2 Bos & Pul 270 remain good as to the residue
D° — 420

Judgment on a Plea in Abatement

As a Plea in Abatement does not regularly go to the

the merits of the Cause: a Judgt upon it does not regularly go in Bar of a subsequent action for the same Cause. One manner by Judgt by Default is pleadable in Bar to a subsequent action for the same Cause: a Judgt in Chief in favour of the Deft 4 Bac 29
is a Bar to another action agst him for the same Cause. This is founded on the idea that the merits of the Cause have once been determined 8 Co 37
This is the ground of the rule. But a Judgt on a Plea in abatement does not go to the merits of the Cause. The real Cause of the Complaint is not regularly tryed in question by a Plea in Abt

But I give this merely as a Guide, for there are Cases where a Judgt in a Plea in abatement is in Chief and goes to the merits of the Cause. As Alienage in a Real action. This goes to the subject matter in dispute between the parties. Here a Judgt on a Plea in abatement may be pleaded in Bar of a subsequent action for the same Cause. Supra

The Judgt on a Plea in abatement when rendered in favour of the Plea of the Deft is that the Writ be quashed or abated and this pleads on and to the suit. It is true under the stat of Jeofails the Plt may often amend his Writ. But I have nothing to do with Jeofails 1 Vent 22
here. The suit ceases when the Writ is quashed 1 Show 42
But I am supposing a Case where there is no Rylands 112
amendment. 3 Co 303
2 Wms 39
2 Wms 367
1 Salk 542

But

3 Bac. Ab. 303
2d. 396.
2 Wilson 367
1 Ca. Ab. 542

But when Judgt is rendered for the Plff on a plea in abatement it is different in the two cases of a Judgt on Demurrer to the plea and Judgt on an Issue in fact

If the plea in abatement is overruled by demurrer the Judgt is "Respondeat ouster" let him (the Deft) answer over again. This is an interlocutory Judgt preceding the final Judgt

3 Bac. Ab. 303
2 Wilson 367
1 Ca. Ab. 542

But if Judgt is for the Plff on an Issue in fact formed by a plea in abatement the Judgt is a Judgt in chief & recovery let the Plff have Judgt & the reason given is that as the Deft had obliged the Plff to answer to a plea which was false and unfound Costs the Deft shall not be allowed to plead again The Judgt is a part of the retribution upon the Deft

6 Vin. Ab. 118
Tylerton 112
2 Wilson 367
1 Bac. Ab. 15
2 Ld Ray 1594.
6 Mod. 238

But in trials for capital offences this rule does not hold as the criminal may have the privilege of answering over to the action if this plea in abatement fails.

* Having stated this as a reason for it viz that the Deft is entitled to one trial only & answering the issue found &c —
2 Hawk. 334
1 Bacon 15.

The Court the rule is the same but different from what it is in England. It is precisely the same when the Deft has Judgt and when the Plff has Judgt on a demurrer.

But when an issue in fact is closed by a plea in abatement the distinction observed by me is this. If the issue in fact is closed to the Jury and Judgt is rendered for the Plff

Judgt

Judgt is in Chief, if it is found for the Ct and Judgt is for the Deft the Judgt is a "respondeat ouster"

"Mr. Swift" has laid down the Gen. Rule in England but has not noted this distinction — 2 Swift 204

The rule in Ct. seems to be simply that such issues shall go to the Jury. But still good doubt if since we have a Statute requiring all pleas in abatement which are in the County Ct to be tried before a Jury is impaneled, which implies that our Legislature intended that there should always be bail by the Ct. The universal practice is in this State to try them by the Court

If that which goes merely in abatement is pleaded in Bar Judgt is in Chief for if the party will plead in Bar he must take the consequence of pleading to the action i.e. a Judgt in Chief. — 2 Ld Ray. 1020; 1 Salk. 634; 1 Lutw. 47; 1 Chitty P. 445

And the Deft may if the Court does not have his writ abated, for of a plea in abatement in Bank in which is true in matter of fact and good in point of Law he may call a "Capias ad Audiendum" i.e. pray that his writ may be quashed — Ld Raym. 333; 2 Lewis. 166; * Judgment for expenses and delay of execution in all actions in Assumpsit

It is an invariable rule that a matter of abatement in a writ is no cause of demurrer in a Deft can never demur in an abatement alone a demurrer only goes to the Pleadings and has no possible connection with the writ and the writ is never demurrable. The meaning of this rule is that the Deft shall not demur to any defects in the writ and if he does Judgt will go against him in Chief — 1 Raym. 15; 6 Mod. 91; Salk. 220; 2 Lewis. 172; Willes, 346; 4 Do. 4; 6 Mod. 108; 4 Do. 6; Gilb. C. P. 268

In "Pleading" there is a distinction to the contrary
Pleading 72 but the modern authorities have settled the rule as it is

But if a person prosecuted for a capital &c.
offence should come to a matter of abatement
2 Hawk 334 Judgt wants not go in chief: and he would be ad
vised to reply over

Hobt 120 After a Judgt &c "Respondeat ouster" a de-
2 Sand 401 cond. plea in abatement cannot be received: for
Kirby 50 if he could plead another he might as well twenty
1 Bac 57 Fine if the writ is amended it becomes a new
Hobart 120 writ and an plea in abatement may be
2 Archina Plea and. Imp 5 made to it. # The same must be taken with the qualification; If one
Capt. Hawkins Co plea is overruled he may plead one of a subsequent
Chesmans words be nonsensical but I mean by them a dilatory plea of the same nature as that overruled &c
4 Bacon 26
Da 143
Jenkins 130
3 Rowe 316

It is a rule of the C.L that after a general imparlance the Deft cannot plead in abatement An imparlance is a continuance of a cause from one term to another

After a Special imparlance he may plead in abatement for this is one granted in such a way as to give the Deft advantage of all exceptions Fine if the cause of abatement arises after a general imparlance he may plead it

This is an exception to the rule. The ground of the rule is that after a Genl imparlance he waives the exception: but he cant be said to waive an
3 Rowe 316 exception which did not exist at the time of the act done. As if a Feme sole be sued and she
may an imparlance and afterwards marries she may plead her coverture at the next Term

And

And the rule is the same that the Deft. can not plead in abatement, when the time for pleading in abatement has expired. In England the time is 4 days from the return of the Writ beginning of the Term.

In Conn. pleas in abatement must be made in the Sup. Ct. before the opening of the Ct in the afternoon of the second day of the Ct in Com. Pleas all pleas in abatement must be made and filed before the impanneling of the Jury which always takes place on the morning of the third day of the Ct.

But it may be observed that the rule in Conn. does not hold, when the Law. Continued the action on the first day, as in Cases of foreign Attachment, when the Deft. is out of the State. Here the Deft has no opportunity for pleading in abatement. He has therefore the same time allowed him at the 2d Term in ordinary Cases, that he had at the first Term.

Matter of abatement cannot be pleaded after the 2d rule, for pleading it is out, unless it goes also in Bar and then it must be pleaded in Bar

But the matter is both in Bar and abatement it may be pleaded to the action as Covenant &c

Our Law practice was to put pleas in abatement without a verification, and then they were considered as sworned to. But the practice is now different and they are allowed as any other pleas

Of

Laws 173-5
Doct Plac 245
Tidd 444
Com. Dig. Abat. H. 8 180
Stat. 342
1 Root 504
Tidd 444
Note 17.

Of Pleas to the Action

These are of two kinds

1st General Issue 2d Special Pleas in bar

II Of the General Issue.

"Issue" in the Law of pleadings is defined to be a single, certain, material point issuing out of the allegations of the parties and consisting regularly of an affirmative and a negative. And it is called an "Issue" from the etymological meaning of the word being derived from the word "exitus" going out" because an issue finally made puts an end to the allegations and closes the pleadings

Mr Gould thinks there is no necessity for the word "material" in the definition as there really are in pleading immaterial issues

And according to the old rule of the Common Law there must be in all cases a direct affirmation and negative to form an issue. And so generally is the rule at the present day tho it has been somewhat qualified. and therefore it may be laid down as a general rule that every issue consists of a direct affirmative and negative

According to this general rule there an averment of one party merely inconsistent with the averment of his opponent pleads not making a negative does not form an issue. Thus if one. –

Plead

that 126a
488 de. 54.
6 Mod 2d Dig. 1
Gaudon PR

1 Salk 213
2 Str 1312
8 Mod 278
6 Mod 126a

party pleads that at such a time I. S. was alive and the other party pleads that at that time he was dead — 1 Roll. Ab. 613.
this is no issue: it should have been "that he was not alive"

But this rule has been relaxed in modern times. for there the Pff said that I. S. was born in France and the Deft pleaded that he was born in England. this has been held to be a good issue — page 174

Another rule is said by the Ct that if the second affirmative is so contradictory to the first that the first cannot be true it would be a sufficient issue. This is extremely loose, and I conceive the division can scarcely be law* Pleas to the discretion of the Ct what ought not to be left. There is no chicanery in the old rule, and it ought to be strictly adhered to. — 1 Wilson 67 Hug. 1177 *This is frequently a long name and how if the Deft was permitted to goon and plead in a dilatory way now and then make a story on his head neither the counsel judge nor jury could know what was denied and what not or what point the controversy rested.

There is one instance at Law, where an issue is formed of two affirmations. In a writ of right the issue is always thus formed. The demandant pleads he has more right than the Deft. and the Deft that he has more right to hold than the Demandant has to demand. — 3 Bl. Com. 305 2 Hug. 1177 *Here the point in question and on which an issue is tried. "mise".

Issues are of two kinds, as in pleadings in Law

General ——— or ——— Special

According to "Laws" they are of three kinds viz. General. Special. or Common. The issue we have in the instance of the latter kind. and that is the kind of "non est factum" to an action of Covenant broken — 4 Bac. 54. Fidd. 5 63 8 Rep. 28 a. Laws. 113 Quod Curia [illegible] it is said in such case it is not the fact that it seems the same how but as to the [illegible] it

3 Bac. Abr. 305

The general issue is the denial of all the (material) allegations in the Plts Declaration. It puts him upon the proof of the whole of his Declaration.

A Special issue is joined upon some fraudulent part of the Declaration, or on some special matter alledged in the course of the proceedings. And every issue in fact except a general issue is a special one.

1 Rast. 120. Laws. 148 D. 12-13 Hans. 142

In actions founded in tort or (when no debt lies) on the case, the general issue is usually "not guilty" but in actions of account, debt, detinue, covenant, trespass on the case for a nuisance, & some others it is usually "nil debet" or "non detinet" &c. as the case may be.

* Vide 18

To actions founded on any misfeasance "not guilty" is in general the proper issue. To Debt on simple Contract "nil debet" is the general issue. To Debt on Specialty "non est factum" To Debt on Judgment "nul tiel record". To an action of Account "never Bailiff or receiver". To Assumpsit "non assumpsit" To Trover "non cepit" To disseisin "no wrong or disseisin". To Ejectment (properly so called) "not guilty" (NB Disseisin is but for an ouster of a Freehold. Ejectment for an ouster for a Term of years.) To an action of Mo-rality. for personal Chattels "non warranti-avit"

3 Mod. 224. 2 Ray. 1500. 2 Lid. 1128. 3 Bac. 305. Esp. Ni. Pr. 167. 1 Ld. Ray. 482. Sty. 102. 1 Lev. 172. 4 Bac. 84. Dyer. 50. 2 Wms. Exs. 867. Taylor on Hearsay. Evidence. Preface to 2nd Edition p. 20. 2 Salk. 424.

To Debt on a Penal Statute "not guilty" is a good general issue tho "nil debet" is the appropriate Gen. issue. The former is good because the action of Debt arises "ex delicto". The Deft denies the Pltes and thus denies the indebitatus founded upon it. Not guilty. Has formerly been taken to be a proper Gen. issue to an action of "Assumpsit" because it was called an action of Trespass on the Case. * (not if the

* and so recited Park.

Cases Pleads "not guilty" (as it is now alled that it is not the fourth issue) and the Pff. joins in Supra.
stead of demurring and Verdict is given. The pleadings are ended.

In Debt for Rent "nothing in arrear" is a good general issue as being tantamount to "nil debet" Cas. Pr. 588
2 Brown. 19
1 Salk. 365
2 Ld. Ray. 1503

In Const. the Gen. issue to Ejectment is "not guilty" or disseisin"

The Gen. issue always contains the words "modo & forma" as that the Deft is not guilty "in manner and form" &c

The Gen. issue never goes always to the Count or Declaration, and not to the Writ. It is a denial of the Pffs allegations and the Declaration contains the allegations. Thus, when the Writ charges the Deft with being guilty generally and the Declaration charges him with Burglariously by the hands of A & B. Now the Deft can only prove that he never was guilty of the Pffs money by the hands of A & B. Unless this is all that he has to traverse 1 Wms Saund 120.

A Gen. issue* regularly concludes to the County and is to be tried by the Jury. This is not an universal rule at C.L. for there are other modes of trying such issues sometimes the trial is by record sometimes by Certificate &c. (Vide Infra Duration, Wager of Law &c) * Vide infra Ex. 3 Com. Dig. 3.13 2 Bac. Ab. 315. 330. 4 Bac. Ab. 54 1 Wms Saund 125

According to this notion of the Gen. Issue the Jury are not themselves the triers of any fact.

They

They are merely the means by which the Judges try a fact. They answer the same purpose as a record, when the fact is to be proved by a record, and "null tiel record" being pleaded. This is agreeable to the strict theory of the Law. The Jury are the medium by which the Judges ascertain the fact.

This distinction has been material for in Criminal Law it is a settled rule, that a man shall not be twice tried for a Capital offence. Suppose the Jury did not agree in the first instance, or one of them had died during the trial so that no verdict could be found. Can he be tried by a second Jury? The argument is that he has once been put in jeopardy, and the rule is that no man shall be tried twice for the same Capital offence. The answer to this is the Jury have not tried him. There is no trial till after a verdict. But if the Ct have never been satisfied of the fact by a Jury they have never tried him.

When "null tiel record" is pleaded the Pl's Counsel concludes with a verification and makes the Jury the fact is to be tried by the Ct and not by the Jury.* But here the issue is not closed. It is then closed by the adverse parties affirming and denying the existence of the record, and praying the inspection of it. This shews that Qu. issues cannot always be closed to the Jury.

And in Conn. by a Statute the pleas may always

Laws 148
2 Dall 443
2 Wilson 413
1 Bl Rep 411.

* Trial by Inspection & Inquiry

always does an issue to the Ct by agreement* Stat. 26 J. Action Civil

The form of tendering the issue in fact is this when the Deft tenders it. "and of this he puts himself on the County for trial" If the tender is on the part of the Plff it is this "and this he prays may be enquired of by the Country" 3 Bl Com 313 1 Just. 126

"But the issue is not yet joined; the other party then adds the "similiter" and the Plff or Deft doth likewise" Lawes 147

In England it seems the omission of the similiter is matter of substance and not aided by verdict The Cts in modern times have evaded this rule by circumstances really ridiculous

In criminal cases the omission is mere matter of form. In Civil cases, matter of Substance. To avoid the rule Cts will avoid them selves of any thing to permit an amendment Hug. 541 Com. Dig. 407 1 Lane 31

The rule may now be considered as shaken tho' practice it would be Law

In Conn. it has been ruled in the Supr. Ct and in the Supr. Ct of Errors, that the omission of the similiter is mere matter of form and aided by verdict in the case of "Huntington 4 Babcock, This is plainly analogous to the civil principle 2 Day 302 where the omission of the similiter is deemed immaterial

Whenever an issue in fact is put to the Ct the facts tendering it must expressly appear else it is bad upon the agreement of the parties

An issue always closes the pleadings and

3 Bl. Com. 314
1 Chit. Pl. 425 a
Gilb. Ca. 88.
1 Saund. 338
Comb. 86

and when well headed on one side must be accepted by the other. When the issue is not well headed or tried or the parties instead of joining may demur for that reason.

The words "in manner and form" - which are inserted in tendering an issue, are sometimes words of the substance of the issue and sometimes mere words of form. The Deft says he is "not guilty in manner and form" he by these words traverses the particular form in which the fact is laid to have been done, and sometimes the fact itself.

2 Saund. 319 note 6.
Stra. 397
Saund. 49
Dy. 120

The rule of distinction seems to be this. If the issue goes to the point of the action i.e. to the material allegations in the declaration the words are mere words of form and of course do not traverse the particular form mentioned in which the fact is alledged. Thus in Assault and Battery the Deft is charged with having assaulted the Pff with sword knives staves &c. The Deft pleads not guilty "in manner and form" these words are here merely formal, and it is not necessary that the Pff should prove that he was assaulted with sword knives &c.

But when an issue is taken on a collateral point arising out of the pleadings the words are of the substance of the issue, and must be traversed in the form in which the particular facts are alledged. Thus if to the Deft

plead

plead a Fee[offe]ment by deed. the Pl[ain]t[iff] traverses it[s] "made & sealed" & the traverse is the mode and form, and a Fe[offe]ment without Deed cannot subsist but the action and Cau[se] be found for the Jury. Lutw. 483 1 Burr. 281. 4 Bac. 50.

This is an arbitrary rule and there can not be any reason for it but I know of no exception to it however.

The true general rule seems to be: that the matters dared not put in issue, the circumstances alledged as time place &c: unless those circumstances were originally material and must always to be proved as laid. When they were material a traverse "made & sealed" will traverse the circumstances Dawes. 120.

An immaterial issue is one taken upon an immaterial point, one which does not decide the merits of the cause. Any issue taken upon an immaterial circumstance and which if found or not found is good and one which does not entitle the Pl[ain]t[iff] to recover tho' the Verdict be found * 4 Bac. 50 1 D[itt]o 163 Cro Eliz 227 Cart[er] 87 1 Wilson 338 Com. Dig 148

* Information in a quare impedit for not presenting to a church vacant by the death of A. B. "made" & "sealed"

An informal issue, on the other hand is one not rightly taken in point of form. It may be taken on a point material, and therefore is not an immaterial issue. An informal issue depends in form only & is aided by verdict. It differs in effect from an immaterial and an informal issue is evidently so in the former case the issue found does not decide the matter in dispute between the parties in the latter 2 Wms Saund 319 note 5 3 Bac. Abr. 395 1 Lev. 32 2 Mod. 154 10 D[itt]o 15 Cart. 371

the

the Verdict cures the imperfection.

An issue cannot be joined when what is called in the Law of Pleadings a negative pregnant or an affirmative pregnant.

A negative pregnant is some negative proposition which implies an affirmative. An affirmative pregnant is some affirmative proposition which implies a negative. Vide Note 19th

1 Bac 94-5
2 Bac 201
Lawes 114
1 Rust 120
D° — 303
Cro Ja. 87
D° — 312

* Note 19

Such pleading is not bad in substance it is cured by a Verdict* and the better opinion is it can be cured only by that & of Anne

Lawes. 114

But such pleading is good when the negative or affirmative implied, is not sufficient to maintain what is alledged on the other side & this was the not established by any judicial decision. appears perfectly consistent with reason

The Gen° issue covers the whole Declaration so that under it the Deft may controvert all the Plts allegations The Gen. issue is not a distinct traverse of each particular fact in the Declaration

Where the Gen. Issue puts the whole Declaration in issue, yet in some cases the Gen° issue is confined to some actions, as Special Contracts. Where the facts laid in the Declaration are not intended to be denied. This is the case where a Contract is void thro' an absolute incapacity of the Obligor. Here in an Action the Gen. issue and every thing except the legality of the Contract

cont

absolute incapacity as when a Feme Covert is sued on a bond. She executes the bond by putting her name and seal to it. yet in the Law being absolutely incapable of executing a Bond. She may plead the Gen. Issue and so shall the Feme by proving her incapacity.

But if the Deed is void, some ill own natured and not from any incapacity in the party to be found out in it. the Gen. Issue is not proper for the defence. As in the case of Usury or any other illegal Consideration. The Law requires it should be pleaded. To an action on Deed. Usury cannot be given in evidence under the Gen. Issue

It contradicts the Gen. Issue for that is "non est factum" whereas the defence is not that it was not his act and deed but that some new matter can be alledged by way of avoidance. Suppose any other illegality in the Consideration that must be pleaded to an action on the Deed. Plus you shew it is different from the Deed of a Feme Covert. for in the eye of the Law she never did execute the Deed. and therefore "non est factum" is a good plea to it.

And it is a Gen. rule of the Law that if a Deed is made void by Stat. the Special matter must be pleaded. It cannot be given in evidence under the Gen. Issue. as in the case of Usury by Stat. mentioned. — 1 Salk. 278 vol. Bac. Ab. 514

And when the Deed is only voidable and not strictly void. it is not competent for the Deft

Pau. Con. 97
Salk. 1
2 Bac. Ab. 1082
Gilb. Ev. 102
12 Mod. 509
6 Mod. 311
Ld. Raym. 145

* Defendant alleges matter to avoid plaintiff's action

* 1 Salk. 278

Esp. Dig. 223
5 Coke 119
Plowden 88
Gilb. Ev. 162
Cabal on Trusts 72
Ld Raym. 1100
3 Burr 1805
Reg. C. 428
5 Coke 119
11 Coke 27a
Esp. D. 223-4

to spread the Grd issued and rely upon the defence. The defence would be inconsistent with the Grd issued as in the case of the same on oath; for to support the Grd issue of "non est factum" on the ground of an incapacity in the Obligor it is requisite the incapacity should be absolute.

In actions brot upon any Deed rasure, loss of Seal alteration after the Deed was delivered and the want of compleat delivery are all taken advantage of under the plea of "non est factum."

A Deed alteration or rasure be made by a Stranger in an immaterial part and without the privity of the Obligee the Deed is not vitiated. Thus, even in such cases the plea of "non est factum" is ill.

But if the alteration be made in a material part the instrument would be vacated and if any alteration be made by the Obligee or his procurement even in an immaterial part the instrument is vacated.

And in general it is held that, under the Grd issued matters of fact only and not matters of Law are in question.* By matters of fact is meant matters of fact contained in the declaration which no question of Law can arise, under the Grd issue for as much as Law do.

Esp. Dig. 224

Thus Grd does not in general include other matters of defence arising from special matter

* The case of Evans v. Evans in the Exchequer in 1788 is ill reported.

It is

It is a General rule of the C.L. that in the action of Indebt. Ass.pt any thing which shews that the Deft has no right to recover the Sum demanded may be given in evidence under the Gen.l Issue. This rule as principle admits to no other action: and how far it applies to express Assumpsit or so not known, or this point I have never satisfied myself. Lawes 3.98.4

In Indebt. Ass.pt the rule is perfectly known. The Record is a legal Duty. Now anything which shews that the legal Duty does not exist shews that there never was an Ass.pt arising from it. Thus in Indebt. Ass.pt Release may be given in evidence under the Gen.l Issue. Because (when it is) they he never did in legal Contemplation assume and promise. So Payment may be given in evidence under the Gen.l Issue: for this shews there is no legal Duty: and this is the only material fact contained in the Declaration. Stag.d 4.98 2 Bur 1010 2 Bl Rep 785 2 H Bl 143 Doug.s 708 3 Burr 1353

Release or Payment may be given in evidence because they discharge the Debt or Duty.

But in this the rule is applied to express Ass.pts in England & known not. And writers can draw this rule with reference to Ass.pts generally. I believe the rule is confined to apply to Indebitatus Ass.pt only. For in Assumpsit it cannot extend to Special Ass.pts

The reason given for this Case is pleading it that the action is not strictly just and

* it seems to me that it is a question how far in Indebitatus Assumpsit we are to consider the Declaration as the Declaration between Merchants & action has not been allowed to the same thing has been attended to as to Bill only but has been generally held and Payment as to both. Bul. N.P. 281. Salk. 120 1 Doug. 142 2 Bac. 60. Gilb. L.P. 177-8 1 Mod. Rep. 210

and being an equitable defence any evidence which shews that the Plff ought not to recover is proper evidence under the Gen[l] Issue.

In Assc[t] Aff[t] the promise laid being proved by a legal Consequence of the duty stated whatever extinguishes that duty discharges the promise

Notwithstanding the rule above the Statute of Limitations Tender Set off Accord & Satisfaction and Bankruptcy must be specially pleaded in an action of Assumpsit* These are matters of Law which go not to the gist of the action but to the discharge of it and they do not deny that originally a cause of action

Doug 401
2 Ray 1153
Lutwy 198
Stra. 375
Ca Ld 147
1 Saunders 283 note 2
3 Bac 518.
* That Assumpsit is a Legal Satisfaction for the Statute of Limitations Assumpsit for Money had & received is a Common Assumpsit for Money received.

This is not always true in the case of Tender but it is in any of the other cases. The Statute of Limitations is as much matter of Law and in the same sense as a release before mentioned

In "2 Ld Ray mond" it is said Accord and Satisfaction may be given in evidence under the Gen[l] issue but the reasons which deny this to be Law

2 Ld Ray 1153
2 Str 565

The reason why these distinctions are taken is not owing to any original mistake in the principles of pleading. The reason why these distinctions continue is that in the case of release and payment they were made in actions brot on Assc[t] Aff[t] and holden good under the Gen[l] issue. In the case of Bank-

Bankruptcy Forder &c they were bro^t in the first instance on express Aff^t and holden not to be good under the Genl Issue

In Debt on Simple Contract the Stat^e of Limitations may be given in evidence und on the Genl Issue So may a release for the defend does not contradict the plea nil debet is in the present time.

The great reason in order to determine when a given defence may be found under the Genl Issue and when not — is this If the defence is inconsistent with the plea of the Genl Issue it cannot be given in evidence under it — if it does not contradict it it may. This rule you have observed is by no means universal)

In actions of Assumpsit express or implied advantage of the Stat^e of Frauds and Perjuries may be taken under the Genl Issue tho' the party may plead it specially if he chooses.

But this looseness of pleading which Bo Karis in Indeb^s Aff^t is not allowed in Cases generally not even in Cases of Torts any more than in actions on Specialties In Torts he cant give a release in evidence under the Genl Issue So of license or any justification

And indeed it is a Genl rule that a Deft cannot give in evidence under the Genl Issue in an action of Trespass any matter of justification, it must be matter of traverse

1 Ch. ca 283. 2 Ld Ray 566 Salk^o 278 Cro^e 262 5 Mod 78 2 Lev 215

Ro Abr Ch 92 1 Levinz 214

4 Bac Ab 60 Willes 17 1 Burr 282 Cowp 478 Hob^t 174-5

new

Justification or denial.

Also it is an universal rule that any defence which cannot be specially pleaded may be given in evidence under the Gen.l issue. Now there are defences which cannot be specially pleaded because they amount to the Gen.l issue.

Laws 111.

* For a third reason why this law made 4 & 5 Ann. c. 16 sec. 4 a special plea in bar it would otherwise work a great hardship as the Def.t would be a double taxed —

In Cont. this is a very different rule from that of the C.L. The act introduced here by Stat.e which extends to all actions is that the Deft. may give in evidence any matter of defence whatever under the Gen.l Issue. except. some act of the Plff which acquits the Deft. from his liability

Stat.e 342

* It would seem as if this rule would be a great relief to the Deft. might sue him & he be put to costs — must in consequence submit to Bill of Costs — but see 2 Swift 208.

The act of the Plff here mentioned is some act which operates as a discharge of a right of action once existing. as release. arrest and satisfaction. — award of Arbitrators recovery in a former action.

Sup.r Ct. have made new rule that under the Gen.l issue a Deft. can give no defence which goes in avoidance of the Contract. a Statement must be delivered & specially the matter pleaded & Plff within three days must give Plff within three days in writing

Kirby 239

An act of the Plff antecedent to the alleged cause of action and which operates as a justification may be given in evidence as. license. So any other act of the Plff which shews he never had a cause of action may be given in evidence under the Gen.l issue as. duress. infancy coverture Release &c.

It has indeed been denied by one Just.e that release may must be specially pleaded to an action on a promissory Note. — This

This is contrary to the true meaning of the Stat[e] and the decision was reversed by the Sup[r] Ct of Errors. June 1808.

The Stat[e] of Limitations may be given in evidence under the Gen[l] Issue. This applies in case of Bills* as well as in cases of Contracts.

* Ld Raym 578

It is said by "Swift" that the Stat[e] of Limitations can not be given in evidence under the Gen[l] issue in Assumpsit.* This is not Law and the reason given does not apply under our Stat[e] besides it does not apply in the case of Stat[e] of Limitations

* Swift 215
2 Wils 143
Doug. 108
* This case is misreported in this 1st Ed[n]
Cas in Ch 588
2 Ray 1072
2 Ray 1500
Salk 278

The Stat[e] contains an exception to the 5th mentioned. "If any act of the Defts" &c That in Debt-debt a release may be given in evidence under the Gen[l] issue. The Stat[e] was not intended to prevent the party from giving in evidence any thing which he could at C Law

* but Salk on the contrary supposes that it was not to be given in evidence at C Law Raym supports Salk to C Law

But it has been holden that a release can not be given in evidence in an action of Trover* &c. under the Gen[l] issue. This decision is incorrect* as this is a defence which was admitted at C Law to the same action. The case was "Bean vs Calkin" June 1804.

* Tho Bean v Calkin intimated in Reynolds 11!!
1 Day -

The Deft may instead of pleading the Gen[l] issue, deny any single traversable allegation going to the gist of the action and conclude to the Country. He ought to do so and to this is a convenient manner of forming an issue

4 Bac Ab 27
1 Salk 282
Reynolds 105
Laws. 171-2
2 Do 112. 135

and

Comb. Digest. and is what is called a Special issue. It is hardly
Plead. E 1 ever seldom done

A Special plea amounting to the Gen.l issue is regularly indemissible. A recital of a single fact is not a Special plea, because a Special plea alledges new matter. The rule is made because if such a plea were admitted it would unnecessarily lengthen the record and because it tends to refer to the Evidence matters of fact which ought to go to the Jury under the Gen.l issue. Thus in Trespass the Deft. 5 Bac 201 2 Co Ent 201 pleads an "alibi." This amounts to the Gen.l issue D.o 208. 329 Hob — — presents — new matter which Hobart 127 in its legal situation avoids the facts alledged Cro.s 318 This plea does not admit the facts and avoid 1 Vent.s 349 them, nor if denies the Trespass. Tho' a release 3 Keb 309 has been executed it would be a Conclusion of Law that then it is no right of action. Because it can be pleaded Specially But it is not matter of Law whether the Deft. was absent out of the realm when the Trespass was committed. it is mere matter of fact

But to this rule there are some exceptions and some disputed in the Books how the defect shall be taken advantage of.

In the first place a Special plea amounting to the Gen.l issue is good if it Contains Spe- cial matter of justification because the matter of justification is a Conclusion of Law, and ought

ought to go to the Ct In one certain Case of action the Party may be justified as to some allegations and not guilty as to others. It may be proper then to unite the denial with some matter of justification.

Hob 72. 209
3 Levinz 41
Eliz 278
5 Bac 202

Again at C L in the actions of Trespass and Assize the Deft may plead Specially what amounts to the Gen. issue, by giving Colour to the Pl. The only plead title in Themselfs it would be the Gen. issue and no more and bad at Common Law

3 Bac Abr 309

This giving Colour consists in alleging some feigned matter in favour of the Pl. right of action in order to justify a Special Statement of his own action

5 Bac 308
10 Coke 90
Eliz 85
Eliz 132
3 Bac Abr 309
Laws. 51
D. 126, 150

But a Special plea of title in an action of Trespass is warranted by one Stat. Edward made it is said where there is a plea of Title before a single Magistrate it shall go up to the Ct more particular circumstances than in mention

Stat. Title Trespass. 4 & 5 W. & M. c. 23

* Pl. in replying need not give Colour when Defendant claims nothing in right of the Pl. may give Colour in Assault & Battery or Trespass to Land, but if Defendant justifies by Command of Pl. Pl. must give Colour in Trover & Conversion or Defendant may plead Not Guilty & give the Special matter in Evidence. Stephens Treatise on Pleading. I think I would —

The Judges may in their discretion allow a Special plea in Bar amounting to the Gen. issue in some Cases tho' this discretion is regulated by an established rule and the rule as explained is that if the facts pleaded and such may be pleaded in the Lay gentl. the matter may be Specially pleaded that is if the facts — nice questions of Law which ought to be tried by the Ct

Eliz 87
4 Bac 62-3
2 Lutw. 1574
2 Ld. Raym. 1574

* Statement of the Declaration

There is some contradiction in the Books as

as to the manner in which the Plff may take advantage of the defective plea.

In some of the Books it is said to be a good cause of demurrer. But how can this be when the Ct in its discretion may allow the plea. A demurrer must decide the issue of Law. The question is "Whether judgt." between the parties and the Ct have then no discretion. The plea cannot then be overruled.

10 Coke 95a
5 Bac Abr 302
Co Ent 112
2 Do — 157
Hob 122
2 Mod 274
5 Mod 18
Jenkins 305
Co Litt 303

* see Coke that such rules are consistent with each other. It is not in the discretion of the Ct whether a demurrer be overruled but may be overruled.

10 Coke 94
3 Mod 134
5 Bacon 302
Co Ent 165
Do — 319

According to the authorities of such pleading is such a ground of demurrer but the ground of a motion to the Ct that the Gent issue or "nihil dicit" be entered by the Deft. Thus I conceive take the true rule.

But suppose the Ct will not allow the plea on motion by the Plff and they order the Deft to plead the Gent issue or enter a "nil dicit" and he refuses (as they cannot compel him) but joins in a demurrer. In this case Judgt will go agst him on the demurrer. In this way the difference in the Books above specified may be reconciled.

The regular way is to move the Ct for the Gent issue as above stated but if the Deft refuses still then Judgt go agst him on the demurrer.

It is said and commonly said that after the Ct have disallowed the plea on motion and ordered the Deft to plead the Gent issue and he refuses the Plff may take Judgt by de-

by "nil dicit" You Southerton is not bound to 5 Bac 202
demur In Covt it has formerly been the Prac- + 6 Mod Cases
tice to demur specially and take Judgt in Chief and that which
supposed it.* is the better
2 Dan 431

But there is a very material diffce
betwn a special Plea containing the Genl issue and a special Plea alledging Facts Chitty 494-8
which in evidence would support the Genl Issue Salk 394
for the latter does not necessarily amount to the 5 Mod 18
Genl issue. Thus a Release to Debt on a Simple 2 Ray 88-9
Contract is pleaded: this is good pleading yet it Cowp 356
would support the Genl issue. So of Payment on Lawes 112
ness and many others they all support the Genl
issue by being given in evidence under that
pleading Therefore he is not pleading the Genl issue

The Practice observed between these pleas
may be easily seen. A special Plea amount-
ing to the Genl issue is one which contains a
special declaration of facts contradictory to the
allegations in the Declaration

On the other hand no Plea in general
which admits that there was once a Cause of
action or which admits the allegations in the
Declaration amounts to the Genl issue. The facts
pleaded might indeed be given in evidence
on the Genl issue but they do not amount to it

The Genl issue is a denial of all the allegations
in the Declaration. As in the case of a Release
specially pleaded it may be given in evidence
under

Lord Ray 88-9
D. 566; 787,
Vin Eliz 871
Cro Eliz 1978
Cro Ch 188
Salk 394

upon the Gen. issue to debt on a single Contract
but it admits that there once was a Cause of Action
and therefore when Specially pleaded does not amount
to the Gen. issue. Because the Gen. issue never was
was a Cause of action. So of Covenant Injury &c

According to the distinction it is customary
in Court, to plead Specially when defend upon
those originating from "the act of the Plff."

There is another kind of plea necessary to
be noticed. I mean a plea stating Special facts
which go to prove the Gen. issue and concluding
with the Gen. issue in forma & forum. It is in
fact the Gen. issue and not a Special plea
according to it. Thus to an action of Debt on
Gilb Ex 164-5 bond the Deft may plead that the Deed was de-
Salk. 274 livered to "J S" as an escrow to be delivered over to
Want 2. 210. the Plff on a certain condition which Condition
Plowden 66 has not been performed by the Plff. and therefore
it is not his the Defts act and deed. in manner
and form as is alleged. In the case of Covenant
this was constantly the manner of pleading the
Gen. issue, indeed the ancient rule required it.

This is the Gen. issue with an "ifeint" from
the Norman word "ifeint" &c. to evade the ifeint
pleads the Gen. issue in form.

And it is remarkable that there is a contra-
diction in the Books as to the manner of closing
the plea. Some of them say it must close to the

"Country"

"County" and some say it may concluded with a Verification Every declaration shews that it must concluded to the County. If it concludes with a Verification it is not the Gen[l] issue with an "ifs[t]" It is concluded by the Gen[l] issue that the Deft may have the facts go to the County. If it concludes with a Verification it is "ips[o] facto" a special finding amounting to the Gen[l] issue which would be bad

As to its Conclusion to the County — vid —

As to the Verification vid Gilb[s] Ev. 104. Hoy 110

Salk[s] 274
Carth[s] 232
3 Mod[s] 20
Plowden 66
Vent[s] 210
4 Bac[s] 289
Moore 30

As the Law now stands the Deft is more likely to plead in this way Whenever he can plead in this way he may plead the gen[l] issue in its most general form. The only advantage to the Deft is that he can state a question of Law on the record which would otherwise be united with the question of fact It is in general more useful to the Plff than to the Deft because it shews the special facts which accrued upon a defence and confines the evidence entirely to those facts.

Gilb[s] Ev. 103

Pachers Case. The Plff may demur and take issue on the Verification in may plead and conclude with a Verification
Salk[s] 274-5

And it seems that the finding may be determined to the Court concluded to the County &c — and the conclusion is made from facts stated

This must be put upon the Gen[l] issue & then determined &c —

And if these facts will not support the Gen[l] issue it ought to be determined so. The question is however doubtful, there is very little said in the Books. For if the Gen[l] issue in its most general form may in its nature be determined so tho' it should be pleaded the demurrer must be overruled.

Gilb[s] Ev. 104-5

Cro Eliz 119
Gilb. 103-4

I observe that this was anciently the mode of pleading in the Case of Covenant. Anciently if the Plaintiff was void by reason of Something Subsequent &c. as Coverture, or became void by reason of Something "ex post facto" a Plea was made that Deft was not bound to plead the general issue except with an "Estoppel." This is not now the Case

Gilb. Lac. 218
Qu. but see Cawdrey's Case admitted Sup. Jus. mutuum made - Yelv.

and Ld Holt says all Special "non est factum" are impertinent because they subject the Deft to the "quod non habuit." # Thus far of the Gen. Issue

II Of Special Pleas in Bar

Pleas to the action of the second kind are Special Pleas in bar.

Lawes 37-80
4 Bac. 2
Lawes 115-29,
2 Roll. 79
Hob. 104
4 Bac. 70
Cro Eliz 30
D°—— 418
Lawes. 110
D°. 126, 121
D° 118, 148,

A Special Plea in Bar is usually defined to be one which admits the facts stated in the Declaration and avoids them. i.e. Contains Some matter in avoidance of them.

But this is generally true it is not universally true for a Plea in bar does sometimes traverse Some part of the Declaration. Thus if in Trespass the Deft plead a release he must traverse that he has committed any Trespass Subsequent to the release

And indeed there is a Kind of Special pleading, a matter one defense pleaded in the form of a Plea in bar, which does not admit the facts going to the Gist of the action, and this is the defense of an Estoppel. An-

An estoppel is some matter of record or Lawes 38
some writing under seal, which prevents the party
from pleading a particular fact. It precludes the 2 Bl. 130. 140
(Pl.) from averring the facts stated in the Declaration. This is a Plea in Bar but does not deny 3 Bl. Com. 308
any of the facts stated in the Declaration 3 Co. Rep. 340
Wilm. 13
tho' it does not know any more adequate
definition of a Plea in Bar that can be given.

A Plea in Bar however does regularly admit all traversable facts which are not Bar, Salk. 94
avoided by it and is always an avoidance of the 4 Bac. Ab. 2
things not traversed. Co. Lit. 303

(But tho' it is generally true that a Plea Co. Lit. 318
in Bar admits all traversable facts which are 1 Saund. 14
not traversed, yet every Plea of justification Co. 3. 28.
must expressly confess the fact intended to be 3 Term. 298.
justified, because it is said to be always to Salk. 394
(1) Carth. 380.
the fact which the does not confess & avoid
no reason in the rule

* What is now called in Q.B. is sometimes distinguished from making Demand, and is very often used in Declarations in the Action of Ejectment

A special Plea in Bar always alledges Bac. Ab.
some new special matter and therefore it is
called a special Plea in Bar. This distinguishes
it from the ordinary Plea of Not guilty which alledges
no new matter.*

This special matter is usually in the
affirmative. but it is not always for if an action
is brot upon negative Covenants, if the would 3 Bl. Com. 304
plead that he has not broken the Covenants
he must plead in the negative.

This

This plea as it already is new matter ought always to conclude with a verification instead of the form of the Courts. This is the established mode of pleading the pleadings then being as new matter included the adverse party must have an opportunity of answering it

5 Bro. P. C. 310
2 Burr 772
3 D° 1325
Lawes 150
— 154
Carth 54, 55
1 Saund 103 n 2

There is indeed introduced by Statute in England a Special plea concluding to the Country and this is the plea of Bankruptcy It is called the General Issue of Bankruptcy The Statute 5th Geo. 2d allows the Deft to exhibit an Endorsement to plead the plea of Bankruptcy Specially and conclude to the Country

Lawes 145
2 D° 215-234-7.

But a plea which is merely in the Negative need not conclude with a formal Verification. Since the Statute allowing the negative of the issue is not to prove it and therefore it would be absurd for the Party to conclude in this manner "and this he is ready to verify" for when he is not to verify it.

1 Wms Saund 103 n 2

Lawes 145.
* Vide Chapter on a Demurrer and Replication and when the Party must conclude to the Country

* So a general release of all Accounts does not admit as of course what it does not deny Hence "full Debt" is no plea to Debt on Bond because the plea of "full Debt" does not deny the execution of the Instrument sued on and as it contains no new matter in avoidance it is not a Special plea It therefore admits a right of recovery

Hob 88
Cro Eliz 58
3d Mod 369
Hardr 33
2 D° 332
4 Bac Ab 83
* Where Deeds are recited or stated in pleading the Deed itself must be produced to the Court or Profert made of it unless it be stated to be lost destroyed or in the hands of the Adverse Party
1 Saund 338 n 4
Salk 218 Ld Raym 732
Carthew 43

There are some general requisites to be observed in every Special plea.

Lord Coke's general rule is that every Defendant

must plead such Facts as it pleads and must
be answerable to the quality of the Case stated and 1 Burr 285
Condition. This rule is so general that we get 2 D° 303
no adequate idea from it. It amounts to this
every one who pleads must plead in good form!

2 Black Com 308
1st Every special plea must contain issue
2 Wilson 138
2 Wilson 74
Lawes 137-8
issue matter and it must consist of such
matter as that an issue may be taken upon
it. Therefore the Defendant surely could not law
ever what is alledged because what is not issue
able is not traversable In fact if it is not is-
suable it is unTraiable.

And every special plea in which fact and
Law are so blended that they cannot be separated
is ill. The matter raising the question of Law
ought to be separately and substantially plead
ed that it may be separated from the mere
matter of fact. Plea in Trover for Goods of the
Deft shewed plead that he is lawfully entitled to
the Goods of all Felons and then averr that the
was the Goods of a Felon this plea would not Lawes 135
be good in the first Part of it for the Answer 4 Coke 95
would be that he is not lawfully entitled and the
question of Law and fact would so together
the should plead the special matter of
fact which constitutes the lawfulness of his
claim and not plead so generally as in the
case stated before 2d Another very important rule

is

is that the plea in bar must answer the whole gravamen or cause of action or it is ill not only as to that which is omitted but "in toto"

3 Levinz 375
vin Elec 208
Hob 104
6 Mod 327-8
1 Rol Ab 830
Laws 135
Ld Raym 171
1 Sand 28 n 4
6 Mod 337
2 Sand 127
6 Mod 47
Salk 392
Com Digest
Pleader E 30
6 Mod E 35

This in an action for Assault & Battery and wounding if the Deft shall plead a justification of the assault and battery only and the plea would be bad "in toto" and damages might be awarded agst him on the whole declaration. The Court will not allow the Deft to take a view of the declaration & he must answer the whole or more the plea must cover as much ground as the declaration does.

So in an action of Trespass if the Deft plead a release for a Trespass upon Commission day the must answer all other Trespasses for the Pltf may recover any one of a hundred committed before the issuing out of the writ

4 Bac 88
Hob 28
6 Mod 370
2 Vin 414

So also in an action cast a Bailee for goods delivered to him to keep and carry and he pleads that he was discharged from the duty of carrying but said nothing about the obligation to keep the plea was determinable because it answered only a part of the gravamen

Cro Ja 374
2 Rolle 414

So in an action of Slander when the words were "She is a thief and has stolen 20 Pounds" a plea that "She was a bad and has stolen 2 Pounds" was not good.

By this rule it is not required that the

the Deft in one plea. shall make an answer to the whole Declaration. He may plead "not guilty" for instance as to one part, and a justification as to the rest. He may traverse a part. plead in bar to a part and demur to the rest. But all his pleas taken together must answer the whole "gravamen" or cause of action

The same general rules hold as to all the subsequent pleadings. The whole gist or substance of the plea in Bar must be answered. So the replication. rejoinder &c. must also be substantially answered. as the plea will be objected

1 Saund. 28 n. 2
1 Roll. Rep. 110.
1 Saund. 337
2 Saund. 127

With regard to pleas not answering the gravamen or cause of action this distinction is to be observed. If the plea in fact. is not an answer to the whole. and is in Law a good answer to part only the Pff may demur because here is an answer to the whole declaration but an insufficient answer.

Salk. 179
1 Saund. 28 n. 4 infra.

On the other hand if the plea in fact. or by its contents as an answer to part only. It is a discontinuance. and the Pff should not demur but take Judgt by "nihil dicit"

1 Wms 28 n. 3
3 Salk. 176
2 Roll. Rep. 267
Stiles 341
Hutt. 303
1 Bos. & Pul. 427
4 Coke 94.
Saund. 135-6

It is said in some of the Books that if the plea which in fact is an answer to part only is in Law good as to the whole. it should be demurred to.* But this must differ from the above case. I conceive it would be safer in this

* Hence also arises the rule that the Pff may demur to the plea and assign for cause that the matter pleaded is no answer to the whole action. 1 Bos. & Pul. 427. Saund. 130

case

4 Coke 52 Case to take Judg. by nil dicit" It makes no
Laws 1350. difference how good his plea may be in sub-
Salk. 179. stance if it only intends an answer to part
1 Saund. 28 The Books are contradictory on this point.

A justification or any other defence which answers the gist of the action would meet the aggravation and then [illegible] is an answer to the whole declaration. This is a defence which satisfies the rule

Thus in Trespass for breaking entering the Plffs. house and expelling the Plff therefrom a plea which justifies the breaking and entering only is good for the expelling the Plff is new matter of aggravation Such a plea is always a good answer to the declaration: it may not be to some other parts of the pleadings & then may be what is called a novel assignment

Laws 163 240
Saund. 70
5 Bacon 213
1 Wms 555
3 Term 292
2 D. 479, 630
3 Barn & 211.
2 & 3 Wilson 20,

A novel or new assignment is defined to be a more particular statement in the replication of what is stated more generally in the declaration. It is in the nature of a new Declaration

Subjoin then the action before stated &
Trespass. The Plff is about to rely on the exhaustion as a distinct trespass and a substantive ground of recovery. He may do it by way of new assignment which makes it a new declaration

1 Term 31 Ry
5 East 314

As it has now become a new declaration the
Defr

Deft may plead to it as such. i.e. plead not guilty &
any other plea. which he might have pleaded had it
been the only thing contained in the Declaration. 2 Lawes 165
D° 240-1

You will perceive the Nature of a moved assign-
ment is to take out of the plea in Bar. or the de-
fence. which the Deft makes in his plea in Bar
what upon the face of it it is a good answer to it

The "moved assignment" must always contain
an averment. that the Trespasses contained in it
are different from the Trespasses mentioned in the
plea in Bar

and it is to be observed further that
the averment in the moved assignment cannot be 1 Saund 299 n 5
traversed for in such a case as this the Deft should 2 Lawes 241
plead the gen: issue "not guilty" and unless it ap- D°. 164-5
pear in evidence. that the Trespasses are distinct
the moved assignment cannot be supported. and
the Deft will prevail. upon his Gen: issue.

It was anciently necessary for the Deft to 1 Rush: 303
set forth specially all the particulars however mi- 8 Coke 133.
nutes they may be. of any defence consisting
of Special matter of avoidance

But now general pleading is sometimes al-
lowed to avoid Prolixity and the rule is as rea-
sonably taken as when the particulars of
any the Defence is specially set forth. & construed 1 Wms Saund 753
to intricateness. i.e. to great Prolixity general pleading 4 Bac: 90
is allowed. When a man is bound to perform Com: Dig 575
Covenants containing a great variety of Acts he 2 Lawes 001

may.

6 co Eliz 746, 2d —— 910 1 Sid 215 2 Vent 202

may plead performance generally. He need not plead all the particular facts. When it is matter of fact. A Plea, reading thus would tend to great and unnecessary prolixity.

So if a Deputy Sheriff giving bond to serve all writs & hand them out when for omitting service he may plead performance generally without mentioning any particular writ. The plea consists of matter in avoidance only, for otherwise it would be impossible for him to plead well.

But the general plea of performance cannot be pleaded to an action of Covenant when some of the Covenants are negative, because it is

6 co Eliz. 69 Cro Eliz 304 1 Inst 303 6 co Eliz 232

said negative Covenants cannot be performed. He may plead performance as to the affirmative Covenants but not as to the negative ones, He must plead that he has not performed the Covenants which he covenanted not to. A plea of performance of negative Covenants is merely a formal defect and can be taken advantage of only by special Demurrer.

It is a general Rule that impertinency is a material point vitiates the plea. But impertinency in an immaterial point does no harm.

2 East 333 1 Inst 303 2 East 339.

It is considered as mere Surplusage and cannot vitiate the determination.

By Surplusage then is meant foreign matter or impertinency in a point immaterial. Thus suppose the Def should state in his determination that

that on the 1st day of November 1812 the last this
goods and on the same day they came into the hands
of the Deft who on the first day of October of the 2 East. 339.
same year converted them, this would be the
general common for the day is an immaterial
(But if he had said "afterwards" on the first
day of octobr" this would be good after verdict
and the words "first of octobr" would be rejected
as surplusage)

As to the same the beginning and concluding as
plea in Bar. 2 Saund. 138, 145, 159, 161. Salk 516.

Of Traverse

There are many things to be considered which
relate to pleadings in general. And first of a
Traverse. This does not come under any general
division. It is by Mod.

A Traverse is a denial of some particular
point in the pleadings and always tended an issue
There is indeed a particular kind of Traverse which
itself forms an issue but this is not to be con
sidered. The Generality is that every traverse tends
an issue, and this traverse may be taken to any 1 Inst. 282
material matter alleged on either side. Immaterial 4 Bac. Ab.
matter alleged is the subject of a traverse. So Evidence, 648
a traverse may be taken to any part of the plead
ings, including the Declaration. It may be ta
ken to a part of the Declaration, to any dilatory
plea unto any special plea in Bar. It cannot
already be taken to the Generality. It is.

It is usually taken with the words "absque hoc" in English - "without this."

It is said by "Bacon" that a Traverse (when 4 Bac Ab 67. he concludes taken) closes the issue This as a general proposition is clearly incorrect This formal traverse 5 Rodd 24 which is taken with the words "absque hoc" - Lawes 121 which is the only form of a technical Traverse Arg. 8 71. does not regularly close the issue but merely ten- 1 Bac Ab 321 ders the issue and regularly closes with a verifi- (X) ang 14 92 cation. but a Verification is never the form of 5 Com Dig 109 closing an issue

Thus supposing the Defts Heads in bar that JS did seize in fee. and thus derives title thereunder. The Plff avers that he did seize in Fee "without this" that he did seize in fee. This is a formal technical traverse. but this Tra- verse does not close or even form the issue. but merely tenders it. The issue is then formed by the Defts replying and that JS did seize in fee in manner and form as he had above alledged in his plea in Bar

Thus words "absque hoc" are words of strong denial in the Law. They mean (as in the Case above mentioned) that JS did seize in Fee and therefore that he did seize in fee is excluded

But these words "absque hoc" are not ab- solutely necessary to constitute a Traverse, for it is held, that the words "ek non" with a reversed sign they are almost always used and contain a

formal

denial of what is alledged on the other side. but not such a denial and such a form as to close the issue

To observed as a Gen.l rule that a Special traverse i.e. a Special traverse concludes with a verification. But a general traverse which makes the whole of what is alledged on the other side concludes regularly to the County. Thus, from the verification "&c in manner & form" to the conclusion is to the County. The Deft to an action of Assault and battery pleads "Son assault demesne" Then is a general traverse going to all the said plea and is in these words "& hoc parat verificare" manner & absque tali causa. These words and a general negative of the whole a/c are pleaded and the traverse concludes to the County

1 Saunders 22
2 Rol.l 439
Laws. 119.

1 Saund 103
3 Rule 3.
4 Bac 67-8
2 Doug. 90
Salk. 4
2 Rol.l 439
1 Bos. Pul. 70
6 Doug. 412
8 Coke 56.
2 New Ab. 364.

Now it may be asked what is the reason, that why a Special ind Common Traverse should conclude with a verification and a general Traverse to the County? For the former there are two reasons, First - it may be immaterial and if it is the other party is not bound to join it and if not bound to join in it the other party ought not to conclude to the County. The pleadings should be such then that the Jury, each of whom the Traverse is made may abandon it if he has any good reason Secondly. in certain Cases when the traverse is immaterial the other party may abandon it and if they attempt it they relinquish and make

a

a Traverse himself upon the inducement which he could not do if it concluded to the Country Therefore a Special Traverse should conclude with a verification.

But in the case of a general Traverse these reasons do not exist. In the first place it certainly cannot be immaterial because an immaterial Traverse is a traverse of an immaterial part of a good declaration, or plea but a general Traverse reaches the whole for what is alledged conjunctly it reaches the good as well as the bad. Secondly - in such a case it is scarcely possible that such a general Traverse should be abandoned, because as the Gen[l] Traverse reaches the whole matter alledged the party cannot abandon the subject of this Traverse, as it concludes the whole before what he has pleaded without being guilty of a desertion.

Laws. 152. D[o] 54 a 154

The word averment and verification, as they relate to the conclusion of a plea are used as Synonymous

It is said however by "Bullen" who was an eminent Special Pleader that a general Traverse may in many cases conclude either with a verification or to the Country because says he "So are the precedents" Now a Special Traverse never can conclude to the Country. Then is no reason why a general traverse should conclude with a Verification. For pleadings never should be left amongst the principles of pleading upon it

Laws 121 a 6 1 Tau[s] 133

And

And on the general Traverse marks all the facts in the Case. It clearly is the proper time to clear the issue The Opinions of Pleading in the case of a general Traverse. Certainly a question to be left. Sum. but so is the Law which they say Ed

2 Ro. Rep. 443
2 Bam 1022

As in the Case above stated when the Deft. to a Plaint and Bailey pleads "Son assault demesne" the Pltff denies the "what by a general Traverse. He may Conclude with a Verification and so the Country. What use is there in granting the liberty the Pltff cannot demur to it or allege any new matter. There is no reason in it. But in every Case a general Traverse cannot Conclude either way. It is only in those Cases where it has been allowed for in no others as I think. It would be

The general Traverse. Is improperly so called as it does not deny matters of record nor argumentative pleas but only matters of fact and does not controvert matters of Law nor matters of Conveyance or interest

Lawes 154-1-3½
8 Coke 10
Com. Dig. Pleader (E) 1 and 2
1 Bam 320

A technical Traverse is Consisting of the words "absque hoc" differs from a denial and has a like denial of a fact not only in its diction Phraseology as found, but generally in its Conclusion Mohun, the Traverse is a Technical one it always differs in both. Mohun it is a general one it differs only in form and not in Conclusion

4 Co Rep 57
Do 177
2 Roy 648
1682 Bam 3 231
Lawes 156
2 Do 446, 149
2 Ro. Rep 430

And this direct and positive denial of a fact stands when the Party tendering the issue does not find it necessary to introduce any new matter. Thus if one Defendant in Detinue says that one Coventry is dead. The Pltff replies that he is alive "absque hoc" that he is dead. This is a technical Traverse

but

2 Saund 205a
2 Ld Ray 205a
1 Ld Ray 103
2 Bl Rep 1032
Ray 98
2 Stra 871
Stra 1167 18
2 Ld Ray 146
2 Bac Ab 439

but instead of this the Deft may reply that he is not dead and put himself directly upon the Country. That again the Deft pleads an Award and Satisfaction. The Plff rejoins some new matter concludes with a traversal Ravet. But if it is not necessary to allege new matter he may reply that it was not accorded & concluded directly to the County. So you see this technical traverse differs from a direct and positive denial in form.

It differs also in Conclusion for a direct and positive denial must Conclude to the County but a special Ravet always concludes with a Verification. Thus on Nelson a Plea the Deft had pleaded, & the Plff may reply that the Contract was made on good and lawful Consideration. He declares what it was "absque hoc" that it was then and there Comunitly agreed &c

But he is not bound to state the Consideration how he but may deny the Deft's allegations directly and positively, and then he must Conclude to the County. But if he does the first mode he must Conclude with a Verification & must declare alledge new matter in stating a good Consideration.

This mode of traversing a fact by way of positive and direct and positive denial obtains only when you give some other answer to the rest of what is alledged on the other side.

It has been a subject of much Contro-

versy

Controversy in the Books whether a wrong Conclusion in this Case is matter of form or matter of Substance. I have already observed that in general, a general traverse should conclude to the County. Now suppose where it ought manifestly to conclude to the County it concludes with a Verification whether this a defect in Form or Substance? There is very little said upon it in the Books. In Sir Thomas Raymond 94* it is said to be a defect in Substance. In another Case in Ventris 240. the Ct expresses a doubt whether it is a defect in form or substance (i.e.) whether it is ill on general or special Demurrer. I confess on principle I see no difficulty in settling this question and there never would have been any if the Determinations had always been understood, even as a Collection of principles. In my opinion it is only a defect in form, for the Objection is not that the Party has not traversed all that is necessary. It is that he has not concluded his traverse properly. He has pleaded what is sufficient for his purpose he has only failed to plead it properly. I should therefore think it ill only on Special Demurrer.

I have observed that there are two modes of denying an allegation 1st By a technical traverse 2nd By way of positive and direct denial. Further when an allegation, on one side is expressly denied on the other by way of direct and positive denial

* Brabbon 117. 2 Do — 164 Adjudged in the 4th Part and that not an Error only and Cited as in Point of Demurrer. Sid 103 2 Do — 285 pl 15 2 Do — 270 pl 15 Vide Precedents Vol 4 5 Mummion 615 understanding the words of the Law Stat 27 Eliz c 5.

1

2

a formal traverse & subjoined to this denial is needless impropper and demurrable & it might be done that this might demur duplicity and traverse infinitely. Thus the Plff avers performance of a condition precedent. The Defts plead that he has not performed the condition &c "without this" that he has performed &c this Traverse is improper &c suppose the Plff might & a how to accrue when he attains the age of 21 years. The Plff then avers in his Declaration that he has attained the age. The Defts plead that he has not attained this "without this" that he has attained to the age of 21 years. This Traverse is demurrable The Party when he denies expressly should have concluded directly to the County.

Thus far I have endeavoured to shew the general nature of a Traverse with the manner of its Conclusion I must now consider when it is necessary to take a Traverse and when not

Hobart 103 Cro Eliz 30 Dyer 305 1 Wilson 259 1 Saunders 22 3 Co 310 Laws. 117-18 115 a 150 2 Saund 206 Cro 44 Dº 206 Gro 87

Under this head it is a general rule that when one Party alleges new matter inconsistent with any antecedent allegations on the other side & does not form an issue upon them a traverse of that allegation is not only needless but improper. Thus Can be no Traverse without words of denial. But when a man alleges new matter merely inconsistent with that is alleged on the other side and does not form an issue he does not traverse

Cro Eliz 755 1 Vent 101 2 Ray 98

but suppose the Plff might & a how to accrue when he attains the age of 21 years. The Plff then avers in his Declaration that he has attained the age. The Defts plead that he has not attained this "without this" that he has attained to the age of 21 years. This Traverse is demurrable The Party when he denies expressly should have concluded directly to the County.

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Plea Assumpsit and Deft pleads that at the date of the writ this Deft was dead. The Plff needs rejoin that he was alive. This is bad pleading. He should have replied that he was alive "without this" that he was dead. And the issue is not regularly formed by it's affirming that he was alive. There are two affirmatives. I suppose there is no inducement necessary in this case. He might have said that he was not dead by way of 2d neck and positive denial. and then have formed the issue

Again the Plff avers that J.S. died seized in fee. The Deft pleads that he died seized in Tail. This is bad pleading He should have added "absque hoc" that he died seized in fee

Therefore the rule is general tho' not universal that where one party alledges new matter inconsistent with the allegations on the other side, but which does not form an issue upon them, he must suppose a Traverse

The new matter in this case which preceded the Traverse is called the inducement to the Traverse. Ad in the case above. The Deft pleads that J.S. died seized in Tail, "absque hoc" that he died seized in fee. This new matter preceding the "absque hoc" is the inducement that which follows from the "absque hoc" is the Traverse itself

The object of the last rule is to enable the parties to form an issue upon which each alledges

(mean)

inconsistent with what has preceded.

But the rule that there must be an affirmative and negative has been reduced to
page 135 a certainty

The writ was that D[efendant] was born in England. The Def[endant] pleaded that he was born in France. The Ct held that this was issue enough.

And a rule like this seems to be laid down by the Ct that where the allegation is affirmatively alledged on one side it be inconsistent with what is affirmatively alledged on the
1 Wilson 0 other side, that the first can in no sense be true
28 Eliz 1177. when that the last can in no sense be true then it is no matter whether there is a direct affirmative and negative or not. This is a deviation from the rule and is an unfortunate decision.

This Genl rule that where a party alledges matter inconsistent with the allegations on the other side and issue being joined upon them a Verdict is necessary does not hold when the party who alledges matter of inducement inconsistent with the allegations on the other side takes the burden of proof upon himself & when he alledges some affirmative matter which he is bound to prove, and bound to prove in the first instance, as where one sues for the Rent reserved upon a Lease, he must allege the performance of the Covenants on his part, the non payment of the Rent, & the ouster by the Lessor, for the Lessee may plead any of these matters in bar of the action, & the Lessor must reply the payment of the Rent, the performance of the Covenants, or the ouster by himself, & issue being joined upon any of these matters a Verdict is necessary. But if the Lessee pleads generally that he has kept the Covenants, & the Lessor replies generally that he has not kept the Covenants, no Verdict is necessary, because the Lessee has not taken the burden of proof upon himself, but has left it upon the Lessor.

* The reason of this rule is that the matter of inducement is not the point in dispute between the parties, & therefore it is not necessary that it should be found by the Jury, but it is sufficient that the matter in dispute between the parties be found by the Jury, & that the matter of inducement be admitted by the parties, or found by the Court.

assign a certain breach, as for instance the non payment of the Rent, he must allege it specially

and

and plead "non mod" bind & plead & rend and ac-
cept same by the Pltf. All this he must do,
and all this he must prove.

Again in a Bond given to a Judge of Prob-
ate the condition is that the Adm. render an
a/c, The Pltf alledges a breach that the Deft has
not rendered an a/c The Deft cannot plead Laws. 150
that he had rendered his a/c, "absque hoc" that he
did not render &c. or that he had rendered his a/c
and complied to the County He must plead
this specially leaving every thing open

Note 20th

"But where a party merely confesses and
avoids by new matter what is alledged on the
other side, a Traverse is not necessary nor proper
it would amount to a repugnancy. What he has
alleged is not a point of fact inconsistent with
what is alledged on the other side and therefore
a Traverse is inadmissible.

Thus debt upon bond or action on contract the
Deft pleads infancy, The Pltf replies a promise af-
ter he came of age. The Deft cannot traverse the 2. Mod 108
point of infancy "absque hoc" that he was under 3. T. R. 309
age for he has once admitted it. In those cases Cro Ja. 221
the new matter must conclude with a new Cro Car. 384
action without a Traverse* 1 Wilson 253
Sawd 118
Plow 265 a 15
2 Ld Ray 1500
2 Ld Ray 1500
*Such seems to have been formerly the opinion but Lord Ray. 1500 Carth 100 Com Dig 10.

Again the Deft pleads a release of the cause of
action. The Pltf replies "by fraud" that it was
obtained by fraud. The cannot traverse the fact that
there was a release, for he has inferentially admitted
it by alledging it was obtained by fraud. When

When a formal traverse is made (as with an "absque hoc") with a protestation the issue is formed by the opposite party affirming over what is thus traversed and concludes to the Country. As Def^t replies that "J S" died seized in Fee in manner and form &c and of this he puts himself on the Country. A formal traverse tenders an issue: the opposite party affirming over what the formal traverse denies.

Salk^o 4 / 1 Inst^s 126 / Laws. 149.

Lo Coke says much in rule on this subject which is very badly expressed and which for a long time I could not understand "viz That an issue joined upon an "absque hoc" ought to have an affirmative after it. As J S died seized instead "without this" that he died seized in Fee. The meaning here is that a negative can not be traversed with an "absque hoc". The Common rule of Grammar will not permit it. The word "absque hoc" are a phrase negative and therefore to follow it with a negative would be to say that J S died seized in tail "without this" that he did not not die seized in tail

6 Edw 6 126^a / Laws 131

And it never can be necessary or even convenient to take the privilege of traversing a negative with an "absque hoc" for the party is bound to allege and prove his new matter "in the affirmative" for what can any question whether the omission of a traverse when necessary is matter of

Sub

substance or matter of form. The objections are contradictory. I conceive for reasons given before that it is matter of form only for if the has pleaded a sufficient inducement to a Rejoinder and has not concluded it with a Traverse he then alledged sufficient and the default cannot then be a default in substance but only in form

Auth. Copyholder 6
1 Saund 133.
1 Leonard 43-4
4 Bac. 70
2 Mod. 60.
* It is made by Stat 4 & 5 Ann. made matter of form only.

If the Deft in traversing the Pltfs title shews in his inducement a defective one in substance (i.e. a defective defence) his plea is bad, This is no other than an example under a general rule of pleading before laid down that when a party shews himself no good defence he cannot support it. This extends to an inducement to a Rejoinder

Dawes. 118.

It is a general rule that there cannot be a Rejoinder upon a Rejoinder. This rule is found'd in reason and necessity.

By a Rejoinder upon a Rejoinder is meant that when one of the parties has tendered a material Rejoinder the other party cannot leave it and tender one of his own to the same point i.e. one of his own upon the inducement to the first Rejoinder

Hob. 104
1 Inst. 282 b
5 Coke 120
Plowd. 101
Hutton 76
Cro. Eliz. 611
Dawes 118

By the same point is meant the same identical ground of claim or defence Followed out that when one party has tendered a material Rejoinder the other was bound regularly to join in it. And the rule is that the Issue shall join in the material Rejoinder

in

– tendered and not tender a new one of his own to the same point

Pltf surrejoined Deft. traverse that P & D seised in fee the P. mentioned that he and Surgeon in tail "absque hoc" that he did seize in fee. This is proper. Here is an inducement viz: that he did seize in tail. Now the rule is that Deft must join in this Traverse and not say that he ought to be barred without this "that he did seize in Tail". The Court will not add another Traverse by traversing the inducement to the first Traverse. It should be would be a Traverse upon a Traverse to the same point for the Traverse you see is only a conclusion from the matter of fact contained in the inducement and the only question is whether P & D did seize in fee.

Again the Deft. tenders Issue to an obligation. The P. replies that it was made upon good and lawful Consideration stating what it was) without this, that it was then and there Covinously agreed, &c. Both the inducement and the Traverse relate to the same point viz that there is no Issue for if it was made upon good and lawful Consideration it was not Covinously agreed and if it was not Covinously agreed it was made upon good and lawful Consideration. Now it is not Consistent for the Deft to reply that it was Covinously agreed without this that it was made upon good

and

and Lawful Jurisdiction). The must joyn in the Traverse & say that it was Lawfully agreed &c. and conclude to the Country. For if where one makes a Traverse it is denied the other may abandon it and if he may do it so may his Adjournment and thus as the Case may be the pleading would never be closed

But a Traverse after a Traverse is good even tho' the first Traverse is immaterial

The distinction between a Traverse after a Traverse and a Traverse upon a Traverse is not easily understood by Students But the distinction is important well founded and absolutely necessary for the attainment of the great object of pleading.

A Traverse upon a Traverse is one which goes to the same point & to the same Lawful ground of Claim and defence as the Traverse taken upon the other side does

A Traverse after a Traverse is one which does not go to the same point or ground of defence. But Point of Mixed or order of pleading they may both be a Traverse after a Traverse but the distinction is as above

In the the action of Trespass &c. if a man bring Trespass for two Trespasses Committed and lay it on a Certain day he may prove any Trespass Committed on a different day

& he can do this the Declaration covers all Trespasses Committed before the action brought

But

That a Trespass committed on one day is not a Trespass committed on another day. Now if to this action of Trespass the Defendt plead a release of all Trespasses committed before the day he must traverse all Trespasses committed after the day and before the date of the writ. The Case then is this. A sues B for a Trespass committed on the 30th day of Septr. & B pleads a release for all Trespasses committed before this time and traverses all since to the date of the writ. Now what can the Plt do? He may do one of two things, according to the truth of the case. He may either deny the fact that he executed the release or he may admit the execution of the release and join in the traverse, i.e. that the Defdt is guilty since the release executed and conclude to the County. But it is not a traverse upon a traverse because the release pleaded and the traverse do not refer to the same thing, i.e. to the same Trespass. The Trespass released is one thing and the Trespass traversed is another. But there is a Traverse of a Traverse. No one will dare not go to the same ground of defence for when the Plt denies the execution of the release and traverses the inducement to the Defts Traverse the release of the Trespass being one thing, and the Traverse of the Trespass another, this Traverse is a Traverse of a Traverse.

Again A sues B in Trespass. B pleads that on

on the 30th of August last possessed him by virtue of which possessment he entered upon the Land. If the Jury find as now his plea is bad for the possessment was after the Trespass committed before it was made. Now he should traverse all Trespasses committed before the possessment was made. Therefore he should thus plead. The Jury may join in the Issue and by assigning that he is guilty in manner and form as he alledged he and conclude to the County or he may traverse the Act of the Possessment & so the Trespass caused by the possessment is one thing another Trespass caused by the Defts Trespass is another. Now if he traverses the possessment he traverses a Class of Trespasses different from those traversed by the Defts. This then is a Reverse after a Reverse for it is not one going to the same ground & claim as before as the other.

Again the Plt. sued for a Trespass committed the 1st of September. The Deft. pleads that he had a license to enter on the 10th day of September. Now he must traverse all Trespasses committed before and after the license as the Plt. may prove any one committed before or after that time. The Plt. in reply to this plea may do one of three things. 1st Suppose the Trespass was each committed before the 10th of September. & so he may join in the Issue by affirming that the Trespass was committed before the 10th and conclude to the Country. 2nd If it was committed

committed after this time he will not join in the Traverse, that he is guilty after &c and concludes to the Country. 3 Bac Abr Supposed
Hob. 104 that there was no licence given, he may then traverse the fact of a licence, and this will be a Traverse after a Traverse. For this Traverse is not to the same point to which the Deft has referred in his Traverse.

That part of the distinction between a Traverse after a Traverse, and a Traverse upon a Traverse

I am yet to consider how far and why a Traverse upon a Traverse cannot be allowed. Why should a Traverse be suspended when the Traverse is taken part of the whole ground of the defence or claim? and then Law will never allow the parties to deviate from rules, which must ever be had to a regular and proper issue,

To the rule that there cannot be a Traverse upon a Traverse there are two exceptions. 4 Co

1st When the first Traverse is upon an immaterial point the other party may abandon it and tender a new Traverse of his own which is and a material point, or he may demur to it for immateriality. But if upon issue taken by the first Traverse, the point to be determined cannot be put in question, and if the other party join in it the controversy cannot be decided

As if the Deft should declare in Ejectment that the Deft fell and sold his Trees, and the Pl. should

prove

he cannot that he felo. them for reasons and did so bestow them "absque hoc" that he did not them. This is not a Traverse of a material point for if he did not feloniously them it does not follow that he is excused. The inducement to the Traverse is material, and therefore the Defft may reply that he them not de "absque hoc" that he bestowed them in repairing the House This is a Traverse of the inducement to the first Traverse, and is a Traverse upon a Traverse, &c. the same ground of defence. It goes to the same identical waste. The waste complained of and the waste justified is the same. The Traverse in one case as well as in the other goes to the same point When he says he did not fell the Trees the Trees are the same as if he had he allowed the bestowed in repairing the House, and when the allegation that he bestowed them in repairing the house he is traversed. The same Trees are traversed by the Defft, therefore it is clearly a Traverse upon a Traverse

1 Burk. 282
Carth 110
Co Litt 99
1 Wms Saund 376
Do — 405
1 Saund 22 Burk
Popham 101.
6 Coke 24.
Yelv. 104
4 Rep 440

Upon wch Answer by the way the Defft in the case above supposed is not bound to tender a new Traverse upon the former one, for he may rejoin to it if he chooses.

1 Saund 21

2dly There is another exception. That of bastard where in a Writ of Ravishment it was laid to have been committed in a certain County as in A when the action is brought in B. wch was held good justification because for it was committed in another County viz in B. with an "absque hoc" that he committed it

it in the County of A. The Def^t may abandon the Reward to the matter and undo it Reward upon the point of justification. This is a Reward upon a Reward. The Def^t is allowed to do this to discourage foreign pleas which are false and which tend to oust the Jurisdiction of the Civil Temporary Actions. Now Action B for an Assault and Battery committed in the County of C, 23 Eliz. that he was a Sheriff and by virtue of his Office arrested the Def^t in the County of D, "without this" that he was guilty of the assault and battery in the County of C. Now if the Def^t is bound to join in the Reward he is injured for the assault and battery may not have been committed in the County of C the may abandon the Reward, and take a Reward upon the merits to the fact, for if the Court not according to the strict principles of the Law the Def^t Counsel, would advise him by affirming that if the fact was committed it was within a foreign Jurisdiction, as without this he must join in the Reward and so be defeated.

42 Ass. pl. 13
6 co. Eliz. 99
Yelv. 118
6 co. Rep. 105
3 Rep. 101

And these examples in Trespass you might be led to suspect that this mode of pleading is allowed in many cases, when it is not allowed. But it is a general rule that if the Declaration Covers but one Cause of action which in its nature is severable, so that the Def^t may recover for as much as he proves)

So -

so that the plea in Bar will go to the same point as the Declaration. the Defendant make that part of the plea, which goes in answer to a part of the Declaration, an inducement to a Traverse of the other. viz, the residue of the Cause of action. This he cannot do in Trespass, i.e. he pleads justification on one day and traverses the Trespass laid to be committed on another. So he makes that part of his plea which is an answer to some Trespasses, an inducement of a Traverse to the other. This he cannot do as of and above that the Declaration is in its nature divisable. that a recovery may be had for part and the plea in Bar will go to the same point

1 Saunders 207
1 Bos & Pul 114
Aylmer 225
Com. Dig. Pl. (Reader) 21

As for instance A sues B in an action on the Case on Contract for 100 Dollars. B has paid in part, viz 50 Dollars but has not paid all. He pleads that he has paid 50 Dollars and the Plaintiff ought to be barred "with out this" that he owed 100 Dollars. Now this Declaration is bad only to one Cause of action, but the plea extends to a different part of the ground of action upon which he pleads payment as to part and traverses the part remaining 100 Dollars. This he cannot do, for the fact may be that he has not paid 50 Dollars of the Case laid as above the other must not join in the traverse and consequently could not join in the Issue nor can he have the 100 Dollars and if he denies payment

If

of 50 Dolls he admits & had as to but 50 Dolls due

The difference between the Case of Fitch & his Case is evident. For one act of Fitch he was Convicted any one of a thousand which has been & can be committed. But Hind is one intire Cause of action. What then how is the Defft to plead? He must plead that as to all but 50 Dolls he never assumed and promised to pay, and as to 50 Dolls he has paid them,

Again an action of Nuisance is brot. The Pltf charges the Defft with obstructing them of his ancient lights. The Defft wishes to avail himself of an agreement as to two, and to deny an obstruction of the third. How shall he plead a justification as to two and Conclude with a Traverse as to the third, Plea ill. He cannot do it for he may have obstructed the third light & had no justification as to any. And if he Could thus plead the other party must necessarily join. He should plead that as to all but two he is not guilty, and puts himself upon the Country and as to the two he must plead his justification.

In 1 Term Rep 285, third is an authority respecting the 2 Term Rep 190 to the point that a wrong Conclusion is made. Vide Lutwyche & Com Law. No reason is given and I still think that on principle it is only matter of form.

It is a Gen Rule that the party to whom

a Traverse is tendered does not admit by joining in it the truth of the new matter alledged in the inducement for he is obliged to join in a Traverse and well tendered except in the Cases above excepted. If the rule then were as stated, the party might always alledge important matter in his inducement, and the other party by being obliged to join would of Course admit it and if he admitted it the System of Pleading would become a System of Chicanery, and fraud to delude and surprize. The inducement Cannot be proved, and then for the parties must issue upon what has no connection with the inducement.

A protestation however is sometimes used (as abundant caution) to avoid the admission of the truth of the inducement to prevent the effect of the admission in a future Controversy. A protestation is, (as Mr Stephen says) an exclusion of a Conclusion. It is an obliging allegation.

But a "protestando" is no part of the pleadings for it is not intended for the other side and consequently it requires no answer and Cant be traversed.

But the party tendering a Traverse admits of Course that he does not traverse, for he is at liberty to deny what he pleads. And nothing material can be on the record which is not either denied or confessed. Hence it is a rule that the pleader should deny all that is necessary to destroy the other right, or his pleading may be demurred to.

Bl Dr 308 n.

Com Dig tit Pleader M 6 Laws 143 Co Lit 124 b 303 Com 311. 2 Roll Rep 441

Com Dig tit Pleader N 3 Laws 143

Salk 91 4 Bac Ab 27 1 Wms 338.

Yet he may prevent the admission of any allegations not traversed so far as it respects any future claim by a protestation.

A protestation does not oblige the party against whom it is used to prove the facts protested against he admits the facts as to the principal case. It only prevents the same from being used in any future case, as to the matter to which the protestation extends.

"Blackstone" states this case. "While a man is in villenage & absents himself a villein had brought an action against his Lord, and the Lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his seignory he could not in this case plead both affirmatively that the Plff was his villein, and also take issue upon the demand for this plea would then have been double, as the former alone would have been a good bar to the action, but he might have alleged the villenage of the Plff by way of protestation and then have denied the demand. By this means the future bondage of the Plff was saved by the protestation, & prevented the conclusion which would otherwise have resulted from the admission of the defendant that he had enfranchised the villein since no villein can maintain a civil action against his Lord.

3 Bac Ab 312
2 Bulst 1023
1 Inst 120
Litt Sec 192

A protestation also is the only mode of denying those allegations which cannot be put in issue. An inducement to a Bar is

Com Dig Pleader (E)

Bar

cannot regularly be put in issue and therefore Lawes 148
can regularly be denied only by a Protestation (Plowden 277 b)

But any repugnancy in the Protestation Salk 500
does not vitiate the Plea because strictly speaking the Protestation is not a part of the pleadings
The Plea is a distinct thing from the Protestation. The form and mode of Protestation shews that the two things are totally distinct, for the common mode of Protestation is this - viz" Lawes 142
The Plff. (or Deft) protesting that such and such allegations are not true, for plea saith &c" —
The Protestation then is the only way of denying what cannot be traversed

A Traverse can only be taken on a material point A material point is one which Lawes 148
is decisive of the cause of action If the Traverse Coke 284.
is taken on an immaterial point the issue is Cro Eliz 321
of course immaterial, and the merits of the 2 Saunders 5
controversy cannot be decided. Therefore a Trav D° — 208
ers taken upon an immaterial point is 1 Sid 14 pl 1
determinable ie is the subject of an Immaterial 2 D° 207 b c
Demurrer 3 Keb 817

This defect at Law was the subject Pendleton 195
of a general Demurrer. But by the Statute of 4 Anne 16 Geo 2 cap 7 s 4 Keb 817
(Geo 2 cap 7) the defect is cured and cannot be taken advantage of only by Special Demurrer

A Traverse must not only be taken on a material point but on an issuable point. Cro Eliz 201
Every material point is not issuable. Find every material

12 Bac Ab 88, 81
1 Saund 223
3 Mod 320,

material fact may in evidence be denied and in that sense it is issuable but it is not any material fact that can be denied by plea.

Thus in Assumpsit the Pl. says "in consideration whereof" the Deft assumed and promised This is not so pleaded that the consideration can be traversed,

Rawden 231
2 H Blk 182
Com Dig G 14
Cowp 46, 118
11 Co 8b
Hobart 103
1 Saund 223
2d — 208
2 D — 159
Semble a fact in good pleading should be put in a form that it can be traversed —
2 Rolle 667
11 Co 10a, 10
1 Saund 23, 298
2 Ray 410,

Matter of Law however material can never be traversed, and yet matter of Law is often inserted in the pleadings. According to the general rule matter of inducement cannot be traversed Time, place and exceptions as has been stated. Matter of aggravation as a general rule cannot be traversed for whatever covers the gist of the action covers all matters of aggravation. Right in evidence they may both be denied.

Again every Traverse must be taken on a single point & when a single ground of claim or defence. If it extend to more than a single point it is multifarious & double and is, therefore a defect in form. Duplicity vitiates any pleading because it tends to unnecessarily and doubtfully and Duplicity in a Traverse is as much a fault as in any other plea

next page

To make a good Traverse that which is pleaded must be decisive of the cause of action and traverse is more than this is done in effect

But it does not follow from this that it must be taken on a single fact as one ground of defence may include a vast number of facts

Pl.

Thus in a plea of Usury as many facts may be
set forth as the nature of the agreement will ad-
mit of. Now the Pff may traverse any one or
all these facts and if he does will be but one
single ground of defence. Nyth if the Deft should
plead to an action on a Contract a release and
payment the Pff ought to demur for duplicity.
but he could not traverse both in his replication

Salk 328
Hob. 103
2 Bac. Ab 320
8 Coke 88
1 Bos & Pul. 80
Bull. N.P. 93

Again a ground of defence may consist of
many dependant facts by admitting one of which
you destroy the whole defence As suppose the
Deft pleads an Accord and Satisfaction He must
plead both because they both go to constitute
one good defence. Now the Pff when he comes
to traverse (if he traverses at all) cannot traverse
both the accord and satisfaction because if he
traverses one and supports it he destroys the
whole defence.

If the two facts are material
either of them may be traversed but the Pff
ought not to any both. must if a denial of both
is meant.

Lawes. 48
6 Coke 25.
1 Wilson 338.
Com. Dig. tit. Pleader G 10
2 Bac. 88.

But the general rule is that nothing
except what is alledged can be traversed. for the
definition of a Traverse is "a denial on one side of
what is alledged on the other" Consequently nothing
can be traversed except what is alledged or necc-
sarily implied. If an allegation is necessarily im-
plied it may be traversed. Thus it is said that in
Scotsmont Lessee of Leicester is necessarily implied that
Leicester may be traversed.

2d. — 75. 81
Salk. 368
2d. — 629
Cowp. 682
Doctr. Pl. 84.
2 Wms. 79
Com. Dig. tit. Pleader G 13 - 8

Thus

That a set off is an action to recover upon a parol promise which is within the Statute of Frauds and Perjuries. The Plff declared upon the promise without alleging whether it is in writing or not. The Deft cannot plead that the Plff ought to be barred "without this" that it is in writing because it is not alleged to be in writing by the Plff in his declaration. He should plead this defence specially and conclude with a traverse.

This is a Gen[l] rule but under some further rule which can hereafter be considered you will find this rule waits some qualification.

If an action of debt is given conditioned to pay money at or before a certain day. The Deft pleads payment before that day and no more. Now of this issue is taken upon that allegation as it stands and if found for the Plff it is an immaterial issue; for altho' it may not have been found to have been paid before the day it may have been paid at the day. But if found for the Deft it settles the controversy. Therefore the Plff may traverse the fact that it was paid before at or after the day. and yet this is traversing what is not alledged.

I think therefore it may safely be laid down as a general rule tho I find it nowhere expressed in the Books. That where traversing only what is alledged may leave the issue immaterial there it is confessed and avoided for the other party to make his Traverse evade or show the allegations

2 Bac Abr 744
2 Wilson 173

&c

id traverse what is not alledged. so that A may lead to a material issue.

A Traverse of what is not alledged, is ill even if Immaterial & Determine only. It is bad only in form, because that party ought to plead by way of Traverse what he ought to plead by way of Immaterial matter. The only objection is the material matter was pleaded informally.

* vide Bac Ab Pleas & Plead 2 Lutw. 935 2 D° — 1550 2 Str. Ray 938 1 Saund. 312

And every material fact alleaged in the pleadings may be traversed altho it be matter of Inducement or endorsement. For matter of inducement as a gen. rule cannot be traversed and the instances are very rare in which it is traversed. and the reason is because matter of inducement is seldom material yet it may be material, and then may be traversed.

Bac Ab Pleas & Plead G 11 Co Litt 126 2 Saund 283

As where the Dft in an action of Slander denies that "whereas he took an oath before the Mayor of London" and the Dft said you and you swore". Here is an inducement. but it is this inducement which gives the Dft his right of action, and therefore the Ct said it might be traversed

Co Litt 117 2 Saund 48

I have observed under a former division of this subject, that every plea must be broad enough to cover the whole grievance complained of.

It follows from this rule that where a party justifies or confesses and avoids only a part of the allegations on the other side. his Traverse must be confined to the residue unfit, not avoided.

&c.

As if in Trespass & Deft pleads a release. He must traverse that he is guilty since the release and before the date of the writ. The release extends only to Trespasses committed before the date of the release. Now his Traverse must be continuous with the fact not avoided and that fact is all Trespasses committed since the the release and before the date of the writ*

Hob. 104
Cro. Jac. 418
Salk. 222
Cro. Eliz. 87
* The words included and the following words of the Deft's plea are struck out in a modern hand & inserted as follows viz:-

So if in Trespass the Deft should plead a Feoffment, as this justifies only for all Trespasses since he must traverse all Trespasses and not only the Feoffment in order to save the whole guarantee.

1 Roll. Abr. 934
2 Mod. 108,

To traverse that the Deft pleads a justification at a particular time he must traverse his liability at any other time.

There is however an exception to this rule when the justification is laid and the same day on which the Trespass is laid to have been committed, then the day is agreed upon by the parties and the Trespass justified and the Trespass remains undefined. It is Prima facie a good plea and saved the whole guarantee without any additional Traverse. The opinions are not all agreed as to this point but the position above seems to be established

5 Bac. Abr. 206
2 Saund. 295 b
10 Co. 14
Cro. Eliz. 165
2 Ld. Raym. 514-15
3 Keb. 311

But suppose the Deft has laid the Trespass on the wrong day (and this he may do) and the Deft pleads a release on that day and the Pltff has

(over)

really dued for a Trespass Committed on another day. which the Deft really Committed, what Can the Deft do? The Deft must make a proper Assignment in his plea viz that the Trespass for which he actually sued, and of which he Complains was Committed on such a day

2 Saund. 5 a.c.
3 Salk. 42
1 Burr. 138
Ray. 84 a.c.
Bac. Ab. 17

Reversing before and after the day on which the justification is laid is not necessary. if the Deft avers that the acts which he justifies are the same with those Complained of. This is our Common practice in Conn. So if in Trespass. a license on a particular day should be pleaded. &c. he must traverse all ante cedent and subsequent Trespasses. But by the rules of our practice he is not required to do this if he will aver in his plea. that the Trespass Complained of and justified are one and the same according to the late authorities. This practice is now approved of in the English Cts altho there are different opinions upon the subject in the Books

Cro Eliz. 155
Q. a. 228
1 Saund. 298
1 Burr. 138
Salk. 64
Carter. 101
3 Levinz. 277.
1 Saund. 14
2 Do. a.c. 5.
Cowper. 1 Vent. 184
2 Keble 218
5 Bac. 201

But suppose the Trespass which is justified and alledged to be the same Complained of is not in fact true? Then the Deft is to traverse that they are not the same. He is to deny that allegation. and this brings the matter to a Question of fact

With regard to Traverses there has been much speculation. with regard to the form of an inducement. It is said that it is entirely

regulated

negatives and it is asked why it is necessary where the other party is bound to join issue that it will be traversed, & why may he not rely to it and without introducing an inducement with an absque hoc?

1st In the first place an inducement is often used by way of introduction answers a very necessary and proper purpose as has been before explained

2nd When the inducement and the Traverse go to different grounds of defence the inducement is a necessary part of the defence, for the defence is incomplete without it.

3rd The great use of a Traverse is to prevent a negative pregnant Now a Traverse may be framed a Traverse without an inducement is a negative pregnant This is generally true. Whether it will or will not work a negative pregnant depends upon the particularity of the allegations traversed

Suppose that to an action of Assumpsit stating that it was amicably agreed that 10 per Cent should be released. Def'd said without an inducement merely that 10 per Cent was not released This leaves the case open to an implication that 9 per Cent was released which would be Assumpsit Now it may be stated that the contract was made upon good and lawful consideration "without this" that it was amicably agreed & and the inducement prevents the negative pregnant

When the allegation is limited so that a

denial

denial of it in its terms will be idle and immaterial. Where there can be no negative pregnant, and an inducement on that account may not be necessary. Saund. 118.
So where a Def. pleads that he (the Def.) is dead. Plea, that he is not dead. There can be no implication.

It is another rule of pleading that the inducement to a Traverse must consist of issuable matter. The question is asked why is there a necessity for this, when the inducement is not in general issuable? The rule is founded upon this ground. That an inducement to a Traverse is generally necessary, and if it is necessary it must be pertinent and proper, and it cannot be pertinent and proper unless it consists of issuable matter for as the Traverse must be an issuable point, and as the Traverse is nothing but a conclusion from a matter of fact specially stated in the inducement, the inducement must therefore consist of issuable matter.

So in the case of a Traverse after a Traverse if it is necessary for the Traverse is necessary, and material part of the defence, and also it must consist of issuable matter else it does not relate to the point of defence.

Generally a Traverse is a direct denial [illegible] the terms of the allegations. But this mode is not always right. It will sometimes lead to a negative pregnant. Thus where a certain Saund. 114. 2 Saund. 319.
person in the case is dead for a Traverse that

[illegible]

1 Saund 368 g
1 Just 120 a
id — 303 a
5 Bac 201
1 Lucas 30
id — 156
2 D — 179
Com Digest
Pleader 2 S
2 Bac 944
4 Bac 00
2 Wilson 173

ancient lights. If the Deft should traverse on the terms of the allegation, that he has not obstructed those lights. It would be a negative pregnant, for he may have obstructed two and if so the action may be sustained.

So also in a case before mentioned. To an action of Debt on obligation, payable at or before a certain day. The Deft pleads payment before a certain day. The Pltf cant traverse in these words that he did not pay before, for the issue then would be immaterial, and it is clearly a negative pregnant. He should traverse before at or after the day.

So that when you are to traverse all the allegations in the words of them as laid, and when not depending upon this division "that the traversing would occasion a negative pregnant. The Traverse is not to pursue the terms of the allegation.

The Traverse is generally followed with these words "modo et forma" These words are in general matter of form, altho the issue may be so constructed as to make them matter of substance. Prima facie they are not necessary and traversing without these words is good.

Saund 320
Com Digest
Plead G 3

1 Bac 98
Cooke's 87
2 D — 187
2 D — 382

(Pleading a negative pregnant is bad only on special demurrer. It is ill in form only.

Of Duplicity.

Of Duplicity

Duplicity is a fault in all pleading and altho it is laid down as a Gen[l] rule that a fault in all civil & dilatory pleas, yet know that I have said before on that point, you will observe it is a fault in any plea.

1 Sus[x] 302
2 D[o] — 304
4 Bac[n] 118
2 Vander 294
Hobart 295

A double plea is one which consists of several distinct and independant matters alledged to the same point and requiring several answers. By the same point is meant the same single ground of claim or defence

3 Salk[o] 142
1 D[o] — 180

Thus if to an action of Covenant the Deft should plead Infancy and a release; or infancy and fraud or infancy and duress or any two distinct defences to the same Cause of action: this plea would be double. For it would be alledging two distinct matters by way of defence which require distinct answers. As if he pleads Infancy and a release. The allegation of Infancy would require one answer and the allegation of a release another. The allegation of Infancy might require the replication of new facts or a Traverse of the fact alld. The allegations of a release might require the replication of [illegible] &c &c &c

But several different issues tendered to different facts of a Declaration or different facts of a plea does not constitute duplicity. Constant of a Declaration may be

Plene

true and another false. Consequently the Party ought to admit what may be true and traverse it, and deny what is not true, so one part of a Declaration may be sufficient and another not sufficient therefore the Party ought to have an opportunity to deny that part which is insufficient, and answer to the other. Thus the Deft may plead the Gen. issue to one part, plead some special matter in avoidance of another and demur to a third. So that giving distinct answers to distinct parts of a Declaration, or plea does not cause duplicity.

1 Th. Ab. 304 a
4 Bac. Ab. 118
Ld. — 119
Laws. 101-3

So also at Ct if two or several Defts each one may plead for himself as if he was sole Deft. This tho' done may often introduce confusion in suits or Trials, yet it would be unreasonable, for the rule to be otherwise for if each could not plead himself without the concurrence of the other, it would be pleading each at the mercy of the other. There would be perpetual room for collusion between one Deft and the Plff. Pleading them as above is not duplicity.

Hob. 70
2 Stg. 910
Ld. — 1140,
Laws, 132
2 Ch. Cas. 137

The reason why duplicity is a fault in pleading, is that it tends to unnecessary prolixity in pleading, to confusion, and where Costs are taxed according to the length of the record, (as in England) it tends to great vexation. And it is never doubted, nay, I say, that a Deft should make two distinct defences, or a Plff make two distinct

tinct

without answer to one plea. Neither party ought to plead any thing except what will in Law avail him, and if one defence will answer the purpose, he ought not to plead more. Tho there may be a difficulty in selecting one of two defences, when only one can be pleaded. This is remedied by Stat. in England which is to be considered

I have observed what Lawfulness is and the reason is why it forbids every plea

I would now observe by way of general rule that every plea must be simple entire, connected and confined to one single point viz. one single ground of claim or defence

This will in some cases make the pleading more tedious than impertinent for a plea is not demurrable because it is not simple nor because it is not connected with logical accuracy but it is true that every plea must be entire and confined to one single point By this is meant that the plea must be single, and not double, nothing more is meant, These words point out the necessity of unity in a plea and nothing more

By this rule you will not understand that every plea must be confined to one single fact but a number of facts of transient constitute one entire ground of action or defence These facts sometimes must go to one ground of defence as for instance the pleading an account and satisfaction

and

Nelson 194
1 Vent 47-8
Nyland 13

Note 21

3 B & Com 311

and a release both to one action. At Law this plea would be bad, as being double. There are two distinct grounds of defence. But if the plea accord and satisfaction merely he must state the agreement & that it was accepted and agreed that he should give such an action at such a place, and that the Pff should accept it and then he must aver he did give such an action at such a place, and the Pff accepted it. Here are a number of facts and all tho' they are all stated (as they ought to be) yet the plea is not double.

Again here is a plea in Bar of an award of Arbitrators. Here the plea includes a great number of facts, the submission, the meeting of the arbitrators, the award, & if any Condition precedent was necessary to have been performed on the part of the Pff, the Pff giving he must state it and aver performance. Now all these facts are necessary and if so the plea cannot be double.

But it is to be observed that distinct Counts in one Declaration tending to establish one cause of action are distinct causes of action, so not make the Declaration double provided each Count is single in itself. The mere adding distinct Counts in one Declaration does not make the Declaration double. But if each Count is double the Declaration is double.

A Count is the narration of the

* Bac. Abr. 320. 2 Bac. Ab. 1748. 3 Salk. 212. So if an action of Assumpsit be brought & the Defendant pleads that he paid the money in discharge of the Assumpsit & that he was ready to pay it to the Pff & still is ready to pay it to him, this plea is double, for it contains two distinct matters, either of which may be a discharge of the Assumpsit. Cro. Eliz. 134. Cro. J. 871. - 900. So where an action of Trover & Conversion is brought & the Defendant pleads not guilty to the whole action & to the goods & chattels, this plea is double. 2 Hawk. P.C. 391 Ch. 25 s. 131 Cro. J. 535 Cro. Eliz. 871 Comyns's Dig. Pleader 1 W 20

the facts which constitute the cause of action or ground of complaint. It is sometimes called an exposition of the writ

When there are several distinct complaints or causes of action inserted in one count each one of them is called a Count and all of them taken together constitute the Declaration. But tho' the insertion of several Counts in one Declaration does not amount to a duplicity, yet if any of the Counts contain several distinct and independent matters requiring different answers it may be demurred to for duplicity

1 Rep. 374
8 Coke 87
Comb 333
1 Lewin 101.
Ld. Raym 101
3 Bac Abr 295

Different Counts inserted in one Declaration which require different Judgments totally vitiate the declaration so that Judgment cannot be entered for the Cause

The reason why a party inserts distinct Counts in one Declaration is to enable the party to succeed in one if his evidence should not prove to support another. They are inserted out of abundant Caution. They do not amount to duplicity.

3 Bac Abr 295

Non est factum & Nul tiel record are Constitute duplicity. Thus if a Deft pleads two distinct matters by way of defence and one is entirely foreign and not effectable the plea is not double

It is not however to be understood that the plea is not double because one of the defences pleaded is not sufficient in Law. It must be fraudulent altogether insufficient and not effectable

Thus

1 Sid. 175
1 Keb. 961.

Pain saw a party pleaded a release and did not aver that it was by deed and pleaded another release which was held double. Quaere whether the plea of the defence was insufficient in itself yet it was issuable and not frivolous.

1 Vent. 365.
Cro Eliz. 14
Dº — 20
Com. Dig. Pl.
Mod. C. 38
Salk. 4.
Hob. 9.

(Duplicity in a Declaration) Consists in joining distinct causes of action which cannot be joined as Contract and Tort to enforce one right of recovery as if a Plff should declare upon a Contract which the Deft had failed to perform according to the conditions and alledge that the Deft had covenanted to defraud him by reason of which he had failed to perform the Contract. This would be a double declaration because the action is brought for the non performance of a Contract but Tort is joined. Fraud is dolus bonus.

5th page 71
Laws. 74 note)

So in declaring on a Bond the assignment of more than one breach in the declaration (which is by the Plff) is duplicity at Com. Law. It is wholly unnecessary in this action to assign more than one breach. Because one breach works a total forfeiture of the whole penalty. Nil dicit in fact, for the Deft to allege any more.

4 Bac. Ab. 134.
Laws 25-6
2 Vent. 198
2 Wilson 269
Com. Dig. Pl.
Mod. C. 33
3 T. R. 108
1 Vent. 114-269
2 Dº — 222.

In England the Stat. 8th and 9th Wm 3rd has rendered a different rule in actions both on Penal Bonds. That Statute provides that in this action the Plaintiff may assign as much as he

8 Vin. Ab. 121
2 Bac. Ab. 115
Dº — 1111
2 Wms 613
Com. Dig. 35.

Equity he ought it as much as shall recompense him for the actual injury sustained. therefore new rule of Pleading is introduced for he may assign as many breaches as he can. as he recovers according to the real injury sustained. which may depend upon the number of breaches.

This Stat. relates to Bonds &c. in particular and but it has been extended by the 8 & 9 Wm. 3 to all penal bonds

But the rule in Covenant broken 4 Bac. 131
is different from debt on Bonds. for at C. Law 2 Saund. 397
in an action of Covenant broken. the Pltff. may Com. Dig. tit
assign as many breaches as he can. for he recovers according to the real injury sustained. Consequently at C. L. the assignment of more than one breach in an action of Covenant broken is not a nullity

In Cont. also the rule as to assigning breaches on a Penal Bond has always been the same as it is at C. Law. in an action of Covenant broken. Our Stat. does not expressly authorize this manner of pleading but according to a liberal construction of the general Stat. of 8 & 9 Wm. the Pltff. can recover on a Penal bond only according to the actual loss sustained. Therefore in an action on a Penal Bond the Pltff. may assign as many breaches as he pleases.

At C. Law it was held that the Pltff. in debt on Bonds cannot plead more than one breach to one Count of action

Pl. Cont. 27
Hob. 72 Cro. Car.

action, nor inconsistent distinct offences in one plea

4 Bac. 121. Lawes. 27-8. 2 Bac. 109. 3 Com. 308

But by Stat. 4 and 5th of Anne the Deft with leave of the Ct may plead as many distinct defences as he pleases to one cause of action. And this leave of the Ct is matter of Course. This Stat. was introduced to remedy the difficulty and embarrassments which arose from choosing one of several defences which he may have had

page 291

We have no such Stat nor any such plea allowed in Comn. Pleas in Comn. Law is not the same necessity for this Stat as in England for two reasons,

1st We are not obliged to plead specially in many cases when an English Pleader would be obliged so,

2d In this Stat the Deft is allowed a new Trial for mispleading. This is not the case in England yet it would be well if we had such a Stat.

4 Bac. 121

This English Stat. can intend only to other than pleas to the Declaration. It does not authorize the Plt to give two replications to one plea in Bar, nor the Deft to give two rejoinders to one replication. They may be ill pleas as many replications as pleas and as many rejoinders as replications

Com. Digest Pleader (2)

But Duplicity however is a defect in form only and no advantage can be taken of it except by special Demurrer. The objection is not that the plea

* Mr. Justice Story's MS. Notes of Chancellor Kent's Lectures contain the following comment on this passage: "Our Statute of Pleas is not confined to Pleas in Bar, but extends to Pleas in Abatement."

pera wants matter but that alone is an ad-
vantage of it. And this special demurrer must
point out the particulars in which the plea
is double or as "Ld Holt" says the pleader must
lay his finger on it" Com. Dig. tit Pleader C 33. & 2

This last rule that duplicity is only matter
of form does not apply to cases where the Plff.
joins in one declaration distinct causes of action
which according to the rules of pleading cannot
be joined. as distinct substantive grounds of recov-
ery. As if he declare in one Count in Debt
on bond. and in another in Trespass. Here the
Declaration is radically defective. It is bad on
general Demurrer. It is bad on a writ of Error &
is a ground for a motion in arrest. This is a
misjoinder of actions and is much worse than
duplicity. It is bad because the two Counts in
the declaration require different Judgts. Read
Steph. the distinction between a "Judgmacordia"
and a "Capiatur". Thus far of Duplicity

Of making Profert & praying Oyer.

The object of "Profert and Oyer is to be Convinced
It is a general rule of the Common Law that when the
Party declares on an Deed and claims title
under it. he must make Profert of it. i.e. he
must produce it with a Profert in Curia.
These words are drawn from the form of making
the Profert i.e. he must bring it, and produce it
the Deed into Ct. This

Com. Dig. tit Pleader. C 33
2 Bac. Ab. 332

2 Bac. Ab. 134
Salk. 219
2 D°. — 078
2 Ld Ray. 333 2
D°. — 798
1 Wilson 210
Hard. 337

Ray. 333
Salk. 10
3 Lewin 99
Com. Dig. 333
15 Rep. 274
8 Coke 57
4 Bacon 11

But 2 distinct causes of action cannot be joined in one declaration. Thus if slander be charged in the declaration and then a battery committed by the defendant after the slander was published. Wms. Saund. 207 2
4 Bacon Ab. 10

1 Coke 93
Hob. 233
Laws, 967
8 Coke 38
Com. Digest
Pleader D

"Oyer" is made that the adverse party may have oyer and a copy of it and that the Ct may instruct it. The word Oyer means hearing. The object then is that the party may hear it read and if he pleads have a copy of it. And that the Ct may instruct it.

2 Salk. 519
6 Mod. 283

The adverse party when entitled to oyer need not plead without it, until the deed is shown to him. but if he does plead without making a demand he waives and can never again claim it.

Chitty 385
Bunb. 343

But in Great Britain "oyer" is never made of a Bill of Exchange or Promissory Note, because they are not deeds. An action on a Bill of Exchange is generally "Assumpsit" and the instrument is only evidence of the promise laid in the Declaration.

But in Conn. "oyer" is always made of a promissory Note, because we consider it as a deed, and declare upon it as such. We regard it as a Specialty. In the State of N York it has become frequent to seal Promissory Notes, to make them deeds. Our Ct consider the sealing as nothing, and if they are in writing they are deeds. On this subject of pleading with a profert, some distinctions are to be observed.

It is a rule that if a right actually acquired by deed vests, such with the deed, he who claims the right is not obliged to plead the deed even if he has it, and if he is not bound to plead

A. he is not bound to make profert of it. 6 Coke 38 a & b

Yet in all cases where the right cannot 6 Coke 40 a & b
be acquired without deed, he who claims the right 1 Bulst. 119
must plead the deed, and make profert of it. 6 Co. Litt. 143
As an indenture of Apprenticeship, a release, a 3 Keb. 580 1 Saund. 276 a
Devise of Land. These cannot be but by Deed, con- 3 Lev. 156
sequently the Deed must be pleaded with a profert

But when the right will pass without 2 Mod. 84
deed, if the party plead the deed and make title 6 Coke 38
title under it, he must make profert of it, as Land. 97
in the assignment of a lease. If he plead that assignment he pleaded and made title under it he must make profert of it

But when he pleads a deed if he does not 6 Coke. 38
make title under it he is not bound to make
profert of it.

A stranger to a deed may plead it with- 10 Coke 94
out making profert of it. The reason is it is not 3 Leon. 83
in his power to do it. He may indeed compel 2 Rawle 144
the other to bring it into Court by a "Subpoena 1 Vesey 3 94
duces tecum". 2 Str. Rawle 418
1 Saund. 276 a
And a person who acquires title to 8 Coke 75
a inheritance of Land from another who claims title 1 Burr. 225
is not bound to make profert of it. Thus if a 6 Mod. 305
Tenant in Dower brings an action against the Heir
he need not make a profert for he is not bound
to have it in his power.

But to the general rule last laid down there
is an exception in the case of a Bailment by the

Custody

Co Litt, 225a
10 Coke 94
4 Bac 110

Counter by the wife claiming a mesne deed the must plead the deed with a profert & quant the husband is supposed to have possession of the wifes deed and may retain them. In the case of a Tenancy in Dower the Wife is not supposed to have possession of the Husbands deed. They go to the Heir at Law

1 Inst 225
2 Bls Com 256
Laws 97
2 Ves Jun 237

A Release may be pleaded without making profert of the deed and the Law requires that a release should be kept in some certain & public place for the convenience of those who may wish to resort to it. And even a mesne release of the same date in which the plea is made need not be pleaded with a profert. But it is said that in England the party must point out the number of the roll that the other party may easily find it

But tho' a Stranger to a deed may plead it without profert yet privies to a deed must plead it with a profert. privies are those who are in legal privity with the parties to them the deed was given must plead with a profert when the original parties are bound thus to plead

1 Inst 207
2 Do — 317

As where the Heir at Law claims under a deed made to his ancestor he must plead it with a profert & quant this deed goes to the Heir at Law

10 Coke 92
Do — 94

So also where a man limits over an Estate to A with remainder to B the remainder man must plead it with a "profert" & quant as the in

Remark

instrument must to the advantage of both each may have it *

The rule that the Heir at Law must sue alone with a profert when he claims title by Deed to his ancestor does not hold in this State. Under the Law of Conn the real estate of the person deceased descends to all his Heirs. Now suppose there are 10 children and one wishes to sue after partition is made. He may not have the deed for he is no more entitled to it than either of the remaining nine.

I believe he is not even bound to produce it in evidence. According to our practice the particular Heir who sues may produce a copy from the Town record. In England they do not admit a copy. The deed must now is had. The deed then goes to them and he can certainly have it. So if suit were brought in Conn the Heir would not be obliged to produce it. This however is more matter of speculation.

If a deed is lost by time or accident or destroyed by casualty (as by fire) it may be pleaded as without a profert.

So also if the Deed is in the possession of the adverse party it may be pleaded without a profert altho it belongs to the party pleading and he has a right to it.

Yet this pleading will be bad at C.L. and even now would be in England unless the party thus

Qu[illegible]

* Tis in practice. But must make profert of the Letters Patent or lay the Book & Page where recorded or the deed will not be received in evidence.

Lawes Ch. P. 130 and quere Com Dig Pleader C 1.

8 Coke 74b
Do — 75a
1 Brian 10
Sty. 1180
2 Roll. 151
1 Sand. Rules.
2 H.B. 203.

pleading without a profert & states the reasons for omitting the profert. It would be unreasonable He must allege that it has been lost by casualty by time and accident or that it is in the possession of the adverse party. He cannot omit the profert without cause. And he cannot in this situation plead with profert because he will be concluded by it. He has stated in the mind that he has it in Ct. and no evidence will be admitted to shew that he has it not in his possession.

1 Roll. 541
2 Do. 482

You may see the same points ruled in our own Courts.

If shewn in such a case the party pleads with a profert the adverse party is entitled to oyer and as the pleadings stand the party pleading the profert cannot succeed

3 Roll. 153 pl. 2
1 Sand. 9 a
1 Wilson 167

Ask the pleadings may be amended by the party's omitting profert and assigning the reason.

8 Co. 123, 573
10 Coke 92
6 Coke 38

And when the deed is only and mesne to the claim or defence profert is not necessary to be made by the supposition still it is not made unless

But it has been long since settled in

1 Roll. 506

Court that a profert is not necessary and that oyer is as demandable without it as with it. And when in England it is necessary to plead with profert, so that oyer may be demanded in Court oyer is demandable without it

Mr. C. Law

At C. Law when [illegible] was to be made the omission of it is a defect in substance, and at C. Law almost every defect was matter of substance

But now by the Stat. 16 and 17 of Charles 2nd and 4 and 5 of Anne. (the two great Stat. of Jeofails) the omission of a Profert when necessary is cured so as to be matter of form, and no advantage can be taken of it except by Special Demurrer

It is still therefore a defect in form, yet it is aided by a Verdict by the Original Party's. and even by general demurrer

In "Hutton" 34 it is said that if it be cut or defaced and the party to found it with a Profert how is the party to reading it to Issue? How is he to shew it? In such a case it is an established rule that a Sworn Copy or even Parol evidence of its Contents is admissible

Profert must first be made to a Judgment at law to the Ct that it is cut or defaced, Merely alledging it cut will not avail to lay a foundation to introduce this evidence

Tho' in Eq. it is a general rule that where a Deed is cut &c. it is not allowed to introduce this Secondary evidence until it be proved at Law, suitable to the Ct that so that was the act of the Party and secondary evidence that

Hob. 38
Cro Ja. 32
Hob. 173
Cro Eliz 217.
Hutton 34
Some pursuance to the Stat. aforesaid

1 Ca. Ab. 68
Pl. Co. 93
Willm. 314
1 Eq. Ca. Ab. 75
2 Vern. 253
1 Eq. Ca. Ab. 74

the

1 Bott's 446 Chitty 203 6) the deed was lost) can be found then [illegible] the Law allows secondable evidence of the fact. It may be rendered probable in a variety of ways. as proving that this hand had been buried with the testator in it. This is very strong evidence

No 122d

The same evidence is also admissible when the deed is in the hands of the adverse party.

1 Esp. Rep. 2d 50 Chitty 200 1 Phil. Ev. 165 But then another rule will stand down to that notice must be given to the adverse party by the party intending to produce it. and if the deed not given this notice he cannot prove the deed by a sworn copy. and "a fortiori" he cannot by parol evidence. and if the party who has the deed will not produce it the other party may introduce what secondary evidence. Ch. J. Wilde compelled the party to produce it

4 Bac. Ab. 113 The object of the present rule and how the adverse party to have eyes of it. when then found present is made the adverse party is entitled to eye. i.e. as the word imports to hear it read.

Hobt 217 4 Bac. Ab. 113 "But he is entitled to something more than to read it read. He is entitled to a copy of it at his own expence" merely to have it read. might answer a very inadequate purpose

1 Vern. Jr. 9 1 Peck. 149. But eye. is not demandable of a Record even when the party making production of it. becomes also the keeper of it. by Law. he has no right to allow control over it

But if a deed is sealed with, [illegible] a true product is not necessary and the party making it may

read

under it. the other party may demand oyer of it.

And if a Deed is pleaded with a profert. when profert is not made, the opposite party cannot claim oyer of it. As in the case of a deed pleaded by way of indorsement. the party does not make title under it.

Oyer is demandable so that the party may have the instrument and that he may make answer to it. & so that he may plead to what is alledged on the other side. Now where a person does not derive title under a deed altho' he makes profert of it. oyer is not demandable because it cannot enable him to plead any better. profert in such a case is mere surplusage.

Granting oyer where it is not demandable is not Error. Error is not predicable of it. for it can do neither hurt nor good

On the other hand, the refusing of oyer in the case where by Law it ought to be granted is error, for it is depriving the party of a privilege to which he is by Law entitled.*

When oyer is granted the party claiming it may enter it at length. & obtain upon the same and take advantage of any Condition omitted by the party pleading. & any thing which on the face of it operates in his favour.

Also on an obligation or penal bond with a condition. The party may plead this Bond with the

Salk. 497.
5 Mod. 409
Ld. Raym. 525
2 Wilson 365
Dang. on Dyer 478-7
Lawes 97

Salk. 498
1 Saund. 9
Lawes 97
2 Ld Ray. 905
6 Mod. 28

* But to take an advantage of the omission of the Condition or Covenant the Deed must be set forth in the same manner as the Condition or Covenant is pleaded. Lawes

the condition on the record and there that he has performed the condition. for if the condition should never appear the obligee may sue & recover the whole penalty, and after suing the condition the oyee may shew performance

6 Mod. 238. Lawes. 984 3 B. Com. 299

Yet in many cases the party obtaining oyee will have nothing more to do than to plead it upon the record and demur to it because there may be a variance between the instrument pleaded on oyee and the instrument declared upon. And therefore whenever there is such a material variance as would work a nonsuit then the party obtaining oyee may plead the instrument on the record and demur to it. As where A declared in an action of Covenant for 100 Dollrs B pleads oyee. and the instrument is found to be one when the condition is only 50 Dollrs B may plead this upon the record and demur to it

2 Wils. 342 Lawes. 99

If the instrument declared upon is only void in Law to support a Claim or defence or appear on the face of it to be illegal & may be pleaded upon the record and demurred to, But if the insufficiency or illegality does not appear on the face of it then the party must plead the fact by an averment & cannot with safety be demurred to.

But suppose an action of Covt upon a

Penal

plead and in the condition of which it appears that the consideration for which it was given was given was illegal (as for a bribe) Here as the illegality appears upon the face of the condition it may be shewn upon the record and demurred to

But if it gives a single bill for an illegal consideration and it does not appear on the face of it the party must shew the illegality by plea He cannot demur

If the party declaring ayer mistakes the end the adverse party may sign Judg.t as forwant of a plea. or he may procure it to be entered on his side in his replication and then demur

He may thus sign Judg.t because the party praying oyer and reading the instrument and finding it varied from it truly It is a breach of truth of an undertaking engagement and he must at his peril write it truly & therefore writing it untruly this plea stands as tho he had not pleaded at all

1 Saund. 6.
Bro Abr 318-17
Cart 80
45 Eliz 370
Stiles 227

Departure

I am next to consider the subject of departure in pleading

Departure is the desertion or abandonment of a former defence or ground of action for one different from the former and not fortifying it. It formerly there was a strict rule of pleading in which the parties were obliged to keep to the same ground of defence or cause of action throughout the whole proceedings

Lab.

3 Bl Com 310
2 Saunders 5 g
42 — 105
Co Litt 303 a
2 — 304.
Bl Ab 22
Ld Raym 1449
2 Mod Rep 280

has been alledged on his part. Thus the Defendant should justify the Declaration the replication should justify the plea in bar &c
Where a Plaintiff has taken one ground of defence or claim in one stage of the pleadings & abandon it and assumes another he makes a Departure. Thus to an action of assumpsit the Deft pleads in bar a Fedffeasance, and on replication he rejoins a gift in Fact. He is guilty of a departure he claimed in his Bar a Feedimple on Fedffeasance was the claim in Fact by gift

1 Wms Saund 203-4
2 Bls Com 17
Steph 242
Co. Litt 303 a
Bl Ab Departure pl 1
Lawes Pl 10

A grand. The Deft pleads in Bar Release — the Pltf puts in a replication — the Deft rejoins & releases. This is a departure for by pleading a release he admits the debt he was not sued for

So in an action of Covenant whether the Pltf is bound to perform certain things or conditions precedent to his right of action. He must aver performance. The Deft pleads that he had not performed one condition. The Pltf replies that he was ready to perform it & that the Deft refused to accept performance This is a departure. He should have stated this fact as it was

If the matter fact alledged is alledged as a Law in subsequent pleading it is a departure Custom is a departure As where the Pltf brings an action as at Common Law & declares

of Appurtenance, Deft pleads Infancy for his Life 1 Levinz 81
& Law is a good defence) the Deft pleads a Custom 1 Keble 30 pl
of London, by which minors may bind themselves 2 D° — 370
by indentures; This is a defective. He should 2 D° 469 & 512
have shewed this Custom at the Custom.

A plea affirming a right at Law is not
~~justified~~ by a plea shewing a stronger right 3 Levinz 48.
Trin. Term in Replevin for taking the Pltffs Cattle
& in Deft pleads taking them damage feasant
The Pltff pleads driving them out of the County
which was holden to be a defective because the
Law driving them out of the County did not make
the distress a Trespass. He is aided by the
Stat of 32 Hen 8, and 21 Philip and
Mary.

But if one pleads Claim under a Stat 1 Bac Ab 723
and the other party pleads another Stat in the first 1 Levinz 81,
party may falsify his plea by alledging that
the Stat is repealed by a subsequent Act and made
it no defective.

But when the cause of action is alledged
generally in the Declaration and the Deft pleads
what is called an evasive plea, & answers the
cause of action as it is stated in the Declaration
and answers it truly, a new assignment of the
cause of action is not a defective. A novel
assignment may be used but he do made use of
such a defective. But a novel assignment
varying the Statement in the Declaration so
as to bring the true cause of action out is not a

Cause

Cases a Defeasance.

3 Wms 20
1 Saund 28 n
3 Mod 17.
Lawes 164
2 Roll Rep 311.
2 Roll Rep 164 8
Lawes 240

That if in Replevin the Plff pleads a Retorno habendo a certain day and the Deft justifies for that day & the Plff may make a new assignment & he may alledge that the Retorno habendo complained of was committed on another day and that they are not the Retorno habendo justified. This is no defeasance because the day is not material.

1 Saund 117
2 Do 84
Salk 221 b
Ld Raym 732
Co Ca 165
Co Ent 288

A Defeasance is a substantial fault in pleading and is vacated by a Demurrer. If it be said in one plea by Sergeant Williams in his notes to Saunders that it is in a special demurrer only, yet he vacated it as he awards. for all a Defeasance is vacated by a Demurrer even that is a special demurrer if it be for such a defeasance is defective & is aided by Verdict

2 Bay 32
2 Do 84. 94
1 Brown 110
2 Saund 84.
Cro — 117
The presumption that the omission of the Jury to find the whole matter in issue was occasioned by their finding the same to be immaterial
2 Ld Ray 1480
Salk 178.
Cro — 576

Although a Defeasance is a substantial defect it is aided by Verdict. In Coven, it has been decided by the Supreme Ct and affirmed by the Supreme Ct of Errors, that that defect was not aided by a Verdict

When an issue is joined on an immaterial fact and the Court know from the Record for whom to award Judgt a Venire de novo will be awarded

Demurrer

A Demurrer is defined by Ld Coke to be an ingrave & alternative Act of Pleading. For it is founded on no definite rule. It does not admit any thing & rests. A Demurrer is in Writing

Salk

not a plea but rather an excuse for not pleading
ing Plea are but two kinds of pleas, dilatory
& pleas and pleas to the action. Plea admits of
subdivisions but a Demurrer does not come
under any of them. Caused by the demurrer
the party taking it denies that he is bound to
make any answer thereto and therefore says
Judg[t]

4 Bac[n] 126
D° — 130
3 Wilson 242
2 Bl Rep 1234
Lawes 42

The demurrer advances a legal proposition
which is that the pleading on the other
side is insufficient in Law. And therefore
it is said that he is not bound to make an
answer. i.e. what is alledged on the other side
does not in legal contemplation require an answer

A demurrer admits such matters of fact
only alledged by the adverse party as are well
pleaded, but denies their sufficiency in Law
And then you refer it to the question of
Law arising upon those facts immediately
to the Ct. The question is are those facts
sufficient in Law or are they not. It does
not raise a question of fact as a Traverse or an
issue does, neither does it advance any new
matter as a Special plea does. It advances,
as before said a legal proposition.

4 Bac[n] 126
3 Com. 314.
6 Bill 71,

This legal proposition is a denial of
the legal proposition expressly or impliedly
contained in the allegations demurred to. Or the
pleadings contain a Syllogism in substance,

It

Co Litt 72a
5 Co Rep 132
* But it has been held a demurrer to evidence is not the proper remedy where the evidence is merely irrelevant to the issue, but only where it is insufficient in point of law to support the plaintiff's claim. Gilb Ev 257 Bull NP 298 Peake Ev 3rd ed 2 Stark Ev 3rd ed 1 Phill Ev 10th ed 1 Gr Ev 75

Bro Abr Demurr 25
Hardres 248
Salk 218
2 Sand 279
Hob 56
Ld Raym 338
3 Lev 334
Cro Car 325
Lutw 168
Vaugh 70

3 Lev 134
Cro Car 215
Ld Raym 338

Bro Abr Demurr 25
Hardres 248

A demurrer may be taken to any part of the Pleadings & to special matter alledged in any part of the pleadings & that demurrer be taken at any time, as often as cause is found *

I have observed that a demurrer admits such matters of fact alledged on the other side as are well pleaded — but it admits no other facts than such as are well pleaded

If there in an action of Covenant the Deft assigns some breaches well and some ill a demurrer to the whole declaration admits those breaches only which are well assigned and the Deft will have Judgt for those only

Hence this Gen'l rule it follows also that a demurrer never admits an averment which contradicts what before appeared certain on the record. Such an averment is always bad & the Plead, what is false and insufficient can have no legal operation in his favour. Therefore this is good cause of demurrer

For when one pleads a deed and afterwards contradicts the record a demurrer did not admit it

Upon the same principle it is that a demurrer never admits what appears on the face of the pleadings to be impossible. As in the case of this nature where in an action of replevin charging the beasts to have been taken in to

into one Parish and County and the other Party avow
& taking them in another Parish and County, and
then avows that one County was within the other
This was holden to be impossible and that a Demur-
rer did not admit it

1 Sid 40
Com Dig tit
Pleader 2 C

Again a Demurrer does not admit facts and
no which it appears on the record cannot be proved
It is to no purpose that one Party makes arw-
ments which in Law he cannot prove
Thus if one should plead a release of a Bond by
Deed, or a release without saying it to be by
Deed a demurrer would not admit it because
Deed release cannot be proved at Com Law

2 Wilson 390
6 Coke 44 a
Co Lit 254
Lawes 48
2 Wilson 370
Gilbert 192
see the last example
below

Again a Demurrer does not confess allega-
tions which are not material nor traversable
Such allegations cannot be denied, they cannot be
traversed and a Party taking a Demurrer ought
never to be considered as admitting what he could
not have traversed. If he was this consequence
would follow, that a Party would be obliged un-
der certain circumstances to confess allegations
whether he chose to or not

Salk 561
Lawes 168

A Demurrer never admits the truth
of impertinent or immaterial averments —
These are not traversable and therefore a Demur-
rer does not confess them A Demurrer only
generally confesses such allegations only which may
be denied by the opposite Party

4 Bac 131
Salk 561

Again a Demurrer never admits any
Con

Conclusions of Law made by the adverse party from facts stated. Allegations of facts and the only proper subjects of a demurrer. It is insufficient to demur upon a Conclusion of Law

Hobt 56. Thus in a plea of justification. it is insufficient for the Deft after stating the facts which form his justification to conclude "& therefore he was legally" as by the Law he might" do as by Law he had a right to do", Now a demurrer to this plea does not admit this Conclusion of Law. for if so a party by drawing a false Conclusion of Law would prevent the other party from demurring

With this & modification a Demurrer admits such facts as are well pleaded,

1 Saund 213 Com. Digest Pleader 2 W. n 6 - a 6,

After an issue is joined a Demurrer can't be taken but as long as the pleadings are open a demurrer can be taken

A Demurrer is generally called an issue in Law. But is not so strictly considered. It is true, is used as an issue than forms one, because the issue is not formed until the joinder in demurrer is made

3 L 36 313-1415 1 Inst 126 11 Rep 1 29 2 L 54 n 514 Co Litt 71-2

If there is a demurrer and an issue in fact in the same pleadings the Demurrer is usually to be tried first but that the Jury may assess the whole damages for the whole cause at once

Plea in Covenant broken the Deft pleads one breach and demurs to the other. The

demurrer

The Demurrer is twofold first that the Declaration of the damages upon both Counts, but the issue in fact were tried by the Jury could assess damages for that only, and damages must after verdict be assessed on the Demurrer. This is a rule of Exposition and is strictly discordant with the Act for they may have either trial first

1 Inst. 72 a
Palmer 577
4 Bac. 130
6 Mod. 125
by another Jury

And if when one fact is demurred to it is found for the Pltf he may enter a remittitur as to the issue in fact, and have his damages assessed only on the demurrer

Salk. 219
Hyg. 574
4 Bac. 130
3 H. 4 fol. 23
Lamp. 243 4
in Exposition
Comb. 305
Salk 219
1 Ld Ray. 220
Laws. 1, 72

It is a rule that the cannot shew Demurrer to a Demurrer. A Demurrer is not an allegation of new matter. It is therefore absurd to demur to it

It is said however by Ld Holt that there may be a demurrer to a Demurrer when a plea in abatement is not subsisted. This I cannot understand. The demurrer can only raise the only question of Law which can be raised by demurring

Comb. 305
Rep. in Ex. Co. 3 Co. 30 a
Com. Dig. 17 a
Bac. Abr. 124
Salk. 132

And a Demurrer cannot be demurred to it follows that when one party demurs the other party must join. He cannot traverse it, or plead finally to it, because there is no fact alleged in it

The form of a Demurrer in our Country is an abridged one. The Pltf states the declaration and finally thereon concludes and submits himself to the Law and prays Judg and the Dft joins and says his Declaration is insufficient &c

As to the effect or consequences of a Demurrer

Jenkins 306 — It is a rule in Civil Cases that Judg^t upon a Demurrer
Dyer 56 — extending a Demurrer to a dilatory plea is final
D° — 341 — even when it is not final, Judg^t in Chief. It is not a Judg^t of "Respondeas ouster" When the Deft recovers it is "quod recuperet" When the Deft "eat sine die"

2 Hawk 334 — And therefore in Criminal Cases a Writ
11 Coke 60 — of Felony is the same at Com Law If a party is in-
Cro Eliz 490 — dicted for any crime short of Felony, and he de-murs to the indictment and Judg^t goes agst him it is a Judg^t in Chief

2 Hawk 334-8 — But in prosecutions for Felony or any other
2 Hawk 334 — Capital offence the Writ of Error is not taken the
2 Hale 239 — party may plead over after his Demurrer is
D° 243 — D° 257. 225 — overruled. Ld Holt has laid down the rule
A° — 315 — differently in one part of his work and in another part as I have laid it down

3 Lewis 172 — If the Deft demur to the declaration and
3 Lewis 223 — concludes with a plea in abatement & the
— for the Defendant cannot take — Pl^ff may join in Bar or the exception is
— the Decision — in the Demurrer and tho he did not conclude in abatement and have Judg^t in Chief and the Law thereon is admitted.

Demurrers are either **General** or **Special**
The difference between a General and Special Demurrer consists in this A General Demurrer assigns no Special cause of demurrer. A Special Demurrer is one which specially points out the

the Cause of demurrer or the defect on which it is founded Thus if the Deft merely says, "the Pltffs declaration and matters therein Contained are insufficient in the Law" and Concludes with praying Judg[t] this is a general demurrer —

But if he demurs in this way "the Pltffs declaration be an insufficient and for Cause assigns that the Pltff has not had then and there the Cause of action arose" — this is a Special demurrer. The want of a venue Constitutes the insufficiency and it is specially assigned for Cause

It is said by Lawes 167 that Special Demurrers were introduced by the Stat[t] 27[th] of Elizabeth But the it Contains in Cannot. They were not known Commonly by that Stat[t] for they were known 60 — for the Stat[t] was passed This Stat[t] makes, Special demurrers necessary where at Com[n] Law a general demurrer would have answered the same purpose. i.e. when the defect intended to be reached by the Demurrer is a formal defect it is to be a Special Demurrer

But to Constitute a Special Demurrer it must sufficient that a Cause of demurrer be assigned It must be specially assigned i.e. assigned with particularity The assigning of a Cause of demurrer it generally assigned does not make a Special Demurrer. Thus if the Deft says the Pltffs declaration it insufficient and

for

1 Salk[d] 172
6 D[r] — 172
Lawes 167
4 Bac[n] 332

4 Bac 332
Lawes 167
Cro Eliz 332
1 Lawes 337
14 Car[l] 240
2 Will[m] & M[y] 207
Distinguish between general and special demurrer and will have occasion to refer to it again

1 Brian 249 — for cause especially assigned because it is unreasonable and would be found. this is a Gen[l] Demurrer
1 Thom. 242.
Comb 297
22 Ass. pl. 798. — because he has not assigned the particular in which it would be found. He should have specially assigned the uncertainty; as that it wants a Name &c

2 Bulst 267 — I observed that the opinion of Mr Lawes was clearly unsound. The fact is
1 Vent 240. — a Gen[l] Demurrer was anciently special. Ld Coke says there was anciently no such thing as a general Demurrer, and he was eminent in this profession at the time of the Stat 27 Eliz. He says it is a good rule to make them special in all cases because it is safe. & supposes the reason why there may be great doubt at times whether it is a defect in form or in substance

6 Co. 10 76[a]
10 Co. 88.
Salk 185
1 Roll 127.
Ed[s] 164.
Dig. 224.
3 Bac. Abr. 315
Com. Digest
Finch 425-6. — A special Demurrer it is held cleared reaches all defects which a general demurrer does, and others which a Gen[l] demurrer does not
and for the purpose of ascertaining the precise difference between the effect of the two, & hence this rule. Any substantial & material defects are reached as well by a Gen[l] as a special Demurrer. But defects in form can be attacked only by special Demurrer under the Stat 27 Eliz. Therefore one demurs specially, and assigns a special & particular cause of demurrer if this defect really exists the demurrer will reach it and if not demurrer does

Salk 185
1 Roll 127
So in

does not exceed the effect pleaded on the part of the pleading is substantially bad the demurrer will be good

This is a rule introduced by the Stat. 27th Eliz. and it obtains where both the Courts have adopted the reason and spirit of that Stat. as Law

There is a further Stat. on this subject viz 4 & 5 Anne which extended the necessity of demurring specially further than the Stat. 27th Eliz. The Stat. 27 Eliz. introduced the Gen. rule that no advantage should be taken of defects in form except by special demurrer — The Stat. 4 & 5 Anne extends the general rule to certain particular defects expressly named in it and not supposed to be within the Stat. 27 Eliz.

It is further to be observed that in all pleadings two things are necessary 1st That the matter pleaded be sufficient 2nd That the matter be alledged according to the forms of Law. The omission of either of these requisites is good cause of demurrer. The omission of the first is good cause of general demurrer. The omission of the latter is the object of a special demurrer

But what is substance and what is form? This is often a difficult question. They are not subjects of any very practical definition. It must be left to the Judgment of the Pleader

The most definite rule is this. The omission of that without which the new right cannot

[illegible]

5 Co. 34 a and 1 Mod. Rep. 210 and 2 Mod. 44 and 1 Lev. 161 and 1 Sid. 451 and 1 Wms. Saund. 337 a note 1 and 2 and 3 and 4 and 5 and 6 and 7 and 8 and 9 and 10 and 11 and 12 and 13 and 14 and 15 and 16 and 17 and 18 and 19 and 20 and 21 and 22 and 23 and 24 and 25 and 26 and 27

4 Bac 833 (2d 834. 835)

Fort 313 4 Bac 8 Hob 104 3 Co Rep 768 2d — 802 Hob 332

Hodg.r 233 D

a Plea is defect in substance, on the other hand the omission of that without which the very right sued upon does not exist is not alledged according to the forms of Law is a defect in form. Where the defect does not consist in the omission of any thing which is the gist of the action or defence

As for instance of a defect in substance suppose the Plffs right of action is to accrue by the performance of a condition subsequent he omits to aver performance. — This is a defect in substance because by the declaration the very right does not exist unless he has performed that which gives him a right of action

Again suppose in case in which Science in the Deft is necessary to subject him. In the Declaration the Scienter is omitted. This is a defect in substance The Scienter goes to the ground or gist of the action. The omission of the Scienter causes the very right not to appear.

Suppose Assault & Battery" but omits to say the time when it was committed. This is clearly immaterial of form because it is immaterial when he committed the Battery if he did inflict it. The same rights of recovery appear. The action is transitory and the form of Law requires that a venue should be laid. But it is only required as a matter of form.

Again suppose a declaration is double,

to impeach one right of action. Acts of Contract and Tort are combined together by the Pltf which is the nature of this defect? It is clearly a defect in form. The Pltf has shewn enough in and the defect is that he has shewn too much The right of Inquiry appears on the Declaration

Again. Defts pleads specially what amounts to the Gen Issue. This is a defect in form only to amend the plead what is sufficient. he only plead it informally. It results from what I have before observed. that when there is a total want of Declaration. (as where the Declⁿ does not state materially, or where a material allegation is omitted. (as Pltf in Trover does not allege Property or in Trespass Possession) a general Demurrer is broken.

If one party pleads a plea which by the face of the proceedings he appears to be stopped from pleading. It is ill on general Demurrer because it appears that he has no right to plead in any form what he does plead

I have observed that no advantage can be taken of formal defects except by special Demurrer I would further observe that as the said Demurrer reaches no other formal defects except those specially assigned as Cause of Demurrer, so as to all defects not specially assigned the Demurrer is a general Demurrer. For assigning a formal defect specially as Cause of Demurrer does not entitle the party to take advantage

Hobt 133
D° — 198
D° 232. 301
Carth 389
1 Salk 184
Ld Raym 824
Cases t. H. 72
3 Com. Dig. 364

Lawes. 170
Willes. R. 13
Lawes. 170 (8)

10 Coke 88

& any other Journal of such under this Demurrer

I would have Observed that of our Demurrer to the Declaration Judg.t is given for the Deft.s no similar or consimilar Action for the same Cause can afterwards be sustained on the same grounds as are disclosed in the first Declaration. The Deft. cannot bring another Declaration like his first.

2 Vents 169
2 Lev.d 172
Cro Eliz 35
D.o 867-8
Cooke 7.
3 Wilson 240
D.o — 304
2 Bro Rep.s 779
D.o 831-827
3. Mod.r 20

But when the Pl.ff sues for want of an essential allegation he may maintain another Action and bring a second Declaration in which the allegation may be inserted. The grounds declared in the second are not then disclosed in the first & the Cause of Action is the same And this is a Rule which justice and Common Sense enjoins. In the first Case the legal merits have once been decided. in the other the legal merits of the second Declaration have never been tried. So if the Pl.ff discontinues his action as if the Judg.t be Arrested for Form and the Declaration is ill on Demurrer he may bring a second Action in Point of Time the two Actions are neither dissimilar nor Consimilar

Indeed

Note 23.d

There are a number of distinctions to be observed. how far a recovery in one Action shall be a bar to a second. These do not fall properly under this Title and will not now be considered

One word touching Costs

P.o

Tho the declaration is bad through a mistake in the pleadings yet if the Defft takes no advantage of the mistake but pleads darrein Bar. or tries the Pltff takes issue. and the right of the matter is found for the Defft. the Pltff shall have no other action

Suppose a Pltff in Trover states a demand and refusal but omits to lay a conversion. His declaration is bad and if it is demurred to. He may maintain a second action inducing the conversion. But suppose the Defft instead of demurring pleads a release and the Pltff takes issue upon it. & finds it for the Defft. the Pltff is barred from a second action. He has found against a plea which stands conclusively that he has no right of action whatever for the cause assigned.

6 Mod 207
Shawn 420.
2d Shawn. 20 –

Note 24

A Demurrer should always extend to the whole of the pleadings on the other side unless a part of that pleading is answered in some other way. This follows from the general rule that the pleading on one side must be coextensive with what is alleged on the other. otherwise the pleading is bad

1 Sid 82
Laws 171
Com Digest
Pleader E 1

It is to be observed that a Demurrer and indeed any thing that raises an issue in Law makes the whole record. and attaches itself upon the first substantial defect in the pleadings. It is usually said it attaches itself upon the first defect. – This is incorrect

So of the Pleadings join upon the Replication. the Pl. must have Judg. upon the whole record. But supp. the Declaration insufficient. the Plea in Bar insufficient. and Def. demurs. Judg. must be given for the Def. for a bad Plea is good enough to [illegible] a bad Declaration. But supp. the Declaration good the Plea in Bar bad. the Replication bad. and the Def. demurs to the Replication. Now the question formally raised is whether the Replication is sufficient to [illegible] Judg. must be rendered against the Def. for the Plea in Bar. and a bad Replication is good enough for a bad Plea in bar *

3 Lev. 244
8 Coke 126
Ed. 133 B
11 Coke 110
Com. Dig. tit. Pleader 2 V.
Salk. 519
Hob. 59
2 Do. — 199
9 Coke 110
3 Coke 52

* Vol. 25.

But if the Plea in Bar were bad only in form, and a bad replication and a demurrer Judg. must go against the Def. because by the Replication he has waived all advantage to be gained from an informal Plea in Bar

3 Coke 52
8 Do. 120 a. 29 b.
Do. — 133
2 Roll. Rep. 1080
Cro. Ja. 133
Do. — 222

But there is an Exception to this rule. The objection obtains in Cases of Debt on Bond for performance of Covenants. Awards &c. In declaring on a Bond if the Def. pleads an insufficient Plea and the Pl. in his Replication alleges no sufficient Breach and Def. demurs. Judg. shall have Judg. Yet here the first default is in point of Law in the part of the Def. for the reason is in Debt on Bond the Cause of Action never arises until the Replication. So the Replication is more a Substitute to the Declaration

also when there are two causes of Action in one Count and Defendant pleads to one and demurs to the other the Pl. shall have Judg. for both the Def. waiving the Demurrer and pleading to the other

2 Bl. Rep. 949
1 Saund. 86.

Declaration as soon as the Deft. pleads & the Cause rises upon the record the whole Contract appears and then cause of action appears in the replication.

Demurrer to Evidence

This is a proceeding of much nicety though it is a strictly rational one

In Certain Cases when the fact determines in an issue in fact one Party may take the examination of the cause from the Jury to the Ct. by demurring to the evidence which the adverse Party exhibits in support of his issue. I say in Certain Cases i.e. where a proper foundation is laid for it (And this demurrer is always to be taken before the Party demurring exhibits any evidence of his own)

2 Ld Ray 1404
1 Salk 170
2 Ld Ray 1113
9 Rod 570
Allyn 18

It is to be observed that the relevancy of the evidence i.e. whether it conduces at all to prove the issue, its Applicability & pertinency is also matter of Law to be determined by the Ct. His rule cannot being ascertained, the question how far it conduces to prove the issue or fact to be ascertained is matter of fact to be determined by the Jury, for it is a maxim of Law that Judges are to determine questions of Law and Jurors questions of fact.

2 Doug 593
2 Ld Ray 1215

A Demurrer must be entire as to the whole of the evidence exhibited in support of the issue on the other side. If the question on the demurrer is whether any evidence at all tends to support the issue or fact & therefore the making the Jury and the Ct. Can be taken off the Jury, & that is allowed to be upon the ground that there is no evidence at all to the fact or as to the way of proof and that they may find as found & leave it

It never can be question'd when to be relevant to evidence which is clearly relevant to the whole issue however weak it may be* stand

And evidence is always relevant to an issue when it tends in any degree to prove the issue

1 Inst. 72 The Demurrer in this case hints and ends to
2 H.Bl. 285 the question of fact and refers to the Ct the ap-
6 D. — 286 plication of the Law to the question of fact shewn in evidence. It cannot the demurrer admits the existence of the facts shewn in evidence by the person demurred on, and like the demurrer denies their legal operation in his favour and their sufficiency to support the issue

In the nature of the thing therefore the
2 H.Bl. 285 fact must be first ascertained before you can
proceed to the question of Law cannot profitably
and Matter of Law is a conclusion from matters of Fact. If there were no facts existing there
could be no Law existing and the province of
Law can admit of no application except to
facts The question is whether the evidence is
pertinent to support the issue but this evidence
must first be shewn

A Demurrer to evidence is never to be entered
issue in fact is joined and evidence is offered in
support of that issue. And here I would
shew the difference between a Demurrer to
evidence and a Demurrer to the pleadings
The latter as the very words import is taken to
allegations advanced on the other side and can never
be taken after an issue is joined. The former is

it never taken to any allegations nor to any part of the pleadings. and is always taken to the evidence of the whole pleading it joined

When the whole evidence exhibited on one side is written. it may be always demurred to by the other. and the party exhibiting the evidence must join in the Demurr. or waive the evidence*

6 co Litt 72a
6 co Eliz 751-2
3 Cokes 104
3 Bac Abr 372
1 Rol 546
Bridg 400
1 Bulst 313
* But the evidence is often such that the Court can see any variance without any plea

Thus if the Plff in Ejectment exhibits a deed as the evidence of his title or if in Debt he should adduce a Covenant under Seal as evidence of the Debt. or when in general any instrument is adduced in support of any plea it may be demurred to.

Whether the party exhibiting [illegible] evidence demurred to is obliged to join in the demurr is not fully settled in the old authorities. but rather the negative seems settled

6 co Eliz 751
6 Do — 752
3 Cokes 104
1 Levinz 87 a
6 co Litt 72

The old opinions are contradictory. In Cooke Elizabeth it is said he is not obliged to join. 6 co part evidence is uncertain. and therefore ought not to be demurred to.

As to this question the following rules are to be observed.

1st If it clearly appear that in such case both parties may agree that the evidence shall be demurred to. and there is no reason for the objection of uncertainty.

6 co Eliz 752

2nd If it is fully settled what sort of evidence by writ or part evidence is to prove every distinct part

Allen 18. fact the adverse party by admitting the fact alle-
2 Hen. B. 201. dged on the record may demur to the evidence
and oblige the other party to join in the demur-
rer and the evidence

Thus suppose in an action of Trover the Def.
offers evidence of a negligent keeping to prove a
conversion. Now if the Deft will admit the fact
that the Goods were lost by such negligent keep-
ing he may demur. And every case where the
evidence is introduced to prove any definite fact
the other party by admitting the truth of that
fact on the record may demur to it. If the
fact is not the very fact in issue it would be idle
now to demur to it but he may.

2 Hen. B. 200 3dly It seems to be now settled the formerly
doubted, that if parol evidence exhibited in
support of an issue is certain and clear & distinct
and explicit the adverse party by confessing the
evidence to be true may demur to it and com-
pel the other party to join in the Demurrer and
waive the evidence for confessing that evidence to
be true which is distinct and explicit is clearly a
confession of the fact it talks. But confessing the e-
vidence to be true as given in by the party would not
always entitle the other party to demur for

4ly If the evidence produced is loose and indeter-
minate the adverse party cannot demur but with-
out admitting on the record the fact which it
tends to prove. But by making such admission on
the

the record he may demur to it whether the evidence is written or parol. Loose and indeterminate evidence is not explained by any examples or by much reasoning. By this word is clearly meant something contradistinguished from what is certain. I suppose this is such as the witness himself is not certain about, such as he does not positively relate. As when the witness says "I am pretty positive." "such was my impression at the time" &c. If the evidence in this sense were demurred to it would be impossible for the Court to make any inference at all. The Jury to be sure might infer that the fact really existed as the witness believes it did, but the Court could make such an inference.

And if the evidence were thus demurred to the party demurring would admit the other parts of the privity &c. of having his evidence weighed by the Jury. The fact must first be determined before there can be a demurrer, & when the evidence is thus loose there is no fact ascertained. The party demurring must therefore admit the fact which the evidence adduced tends to prove. Take the example we proved. The proof went to shew that the property was cast by the negligence of the Defendant and thus that there was a conversion. By the way negligence does not prove a conversion but this is a question of Law to be determined by the Court. Suppose then a witness says he saw the property as the declines in such an exposed situation. Demurring to this would not

Coke 104.
2 Bl. R. 807
3 Wils. & S. 313

concerning to the fact that the party was in this situation. But the party may admit the fact and then demur and the Jury must admit this fact & the other party is not obliged to join in the Demurrer. Indeed he ought not to do same it would be referring to the Court a question of fact.

5th There is another kind of evidence different from those named viz Circumstantial evidence. And here the rule is this. If the evidence is circumstantial the party must admit every fact and every conclusion which the evidence tends to prove & every thing which the Jury might infer from it & then he may demur to it. Now if the party might demur to it without the conclusion and inference he might screen himself a party from proving a fact by circumstantial evidence and the Court are never Judges of inferences from facts. Circumstantial evidence is most frequent in Criminal cases.

Douglass. Day & Dyer 1 H & M 427 3 Bro & P 313

Circumstantial evidence is that which proves facts which facts themselves tend to the proof of other facts. There are the rules applicable to found evidence and the two latter to written ones. Now if the admissions are made in the cases when they are necessary & incompetent for the party to demur and so admit the other party is not compellable to join. For does it not follow that when it is competent for one party to demur to evidence it is the duty of the

Stiles 2 234 Allyn 18 2 Bro P C 207

other to join in the Demurrer

Bk of Watford. the party demurring does not make the admissions which are agreed and the other party actually joins in the demurrer the Ct. can enter no Judg. because the demurrer refers to the Ct. the truth and weight as well as the relevancy of the evidence. This would be to make Jurors of the Ct. but the Ct can make no inference from fact whatever The proceedings then are altogether fruitless and the course then in this Case is to award a "venire de novo" 3 Bl. N. P. 313 4 Bac. 137 2 T. R. 209

Case Sask. Ct. in 1787 decided that in a Demurrer to evidence before a single Magistrate the party tendering the evidence cannot be obliged to join in the demurrer The reason given was an improper one. - It was this. - that a Demurrer to evidence before a single Magistrate would tend to entangle his proceedings This is a point fit for Legislative consideration but a Ct. have nothing to do with it If the party has a right to demur the right is strictly just and the Ct cannot interfere to prevent the use of this right on account of political considerations Thirby 352

The same Ct shortly after decided that the party was not obliged to join in a Demurrer to evidence if the evidence was admissable with-out and all admitted The decision I cannot understand unless they intended to establish a new Court then could in no case be a Demurrer to

to evidence in this Scale or that then can have
2 Swift 257 that demurrer unless the evidence is alike with
law. I suppose the latter was their intention

The point in question a demurrer to evidence is this. If the evidence sufficient in Law to maintain the issue. It is then to be observed Lawyer - that the whole evidence exhibited it is to be demurred to and not any fractional part, for the question is not merely whether this relevant but whether it is relevant and sufficient.

And as the question is whether this evidence is sufficient in Law to maintain the issue, it follows that no advantage can be taken on such a demurrer of any defect in the pleadings

Still after the demurrer is overruled or otherwise determined advantage can be taken of any defect in the pleadings by a motion in arrest of Judgt. It has been held that advantage is then taken in a wrong stage, as it is after the verdict. On principle I should doubt whether it did after a general verdict. I think it will be decided on the same principles, as after a special verdict a Judgt by default or nihil dicit. Now a Genl verdict cures defect for such general verdict supposes every thing in favour of the plaintiff omitted in the pleadings, assessment of damages &c. but any under the direction of the Court would not have given such a verdict unless they had found these facts. But in the case of a demurrer to evidence the whole facts are

and

on the record and are sworn by the Ct. Consequently if there can be no such presumption — 6 Doug. 213 2 Bls. N.P. 313

If Issues questionable as to the in Court advantage might must be taken of any defect in the pleadings when a demurrer to the evidence by motion in arrest as one need not do this when an issue in fact is referred to the Ct. This demurrer to evidence is tried by the Ct. It is a substitute for the trial by the Jury — 2 Swift 258 Issues of law stand or fall on the same grounds as they will in England —

The party whose evidence is demurred to may always demand Judg. of the Ct. whether he is bound to join in the demurrer; and if there is no colourable reason for the demurrer they will not be compelled him to join to prevent a delay of justice on frivolous pretences — Alleyn, 18 2 Rolle Ab. 17 3 Bls. N.P. 314 4 Bac. Ab. 136 2 Ves. Jun. 205-8

But in a demurrer to the pleadings where he must join of Course.

On demurrer to evidence and a joinder in demurrer the usual Course is to dismiss the Jury immediately. & to shew the writs of enquiry to assess damages is (since Stat.) afterwards executed because the operation of a demurrer is to take the trial of the cause from the Jury to the Ct. — 6 Co. Rep. 143 2 Ld. Ray. 60 Salk. 284 3 Bls. N.P. 314 Raym. 410

Sometimes however the Jury assess damages incidentally before the demurrer is determined and as the demurrer is determined so are the damages — 6 Doug. 212

According to our practice when is no writ of Enquiry. The Jury are immediately dismissed and the damages are assessed by the Ct. — 1 Bac. Ab. 570 2 Swift 258

But if a conclusion evidence being objected to is admitted by the Judg. & Counsel proceeds to demurr to demurr in such a case would be to

Salk 284 To all incumbrances by a demurrer an interlocu-
2 Ld Raym 814 tory Judgt of the Ch. Baron it would open to the
Ch. & matter of Law it had once determined. The
proper remedy in such case is by a Bill of Review
or as the case may be a motion for a rehearing

6 Bacon 326 And if a party by saying to demurr to evidence
4 Co Rep 13 is overruled by the Ch. his remedy is likewise by a
Co Chas 244 Bill of Exceptions
2d — 341.
2 Black R. 1117 The whole proceeding in a demurrer to evidence is upon
2 Atk 87. 2089 the motion of the Ch. to determine what admissions the
party shall make.

2 Ld Raym 814. The roll of demurrer to evidence is this
2 Atk 87. 2088 the party demurring must first state the evi-
dence upon the record. He then alledges that this
evidence is not sufficient in Law to maintain
the issue and concludes with praying Judgt that
for want of sufficient matter shewn in that be-
half in evidence the Jury may be discharged from
giving a verdict. The Deft when he demurrs con-
cludes by praying Judgt that the Jury may be
discharged and that the Dft may be hence dismissed
this action

Motions in Arrest

To arrest the Judgt is to stop it from being given when it is
to proceed & commenced. And this is done on
motion made to writing made upon the roll
By this is not meant that it can be no alte-
ration of Judgt without a motion for the Ch. if he
think proper in many cases may of his own
mere motion stop the Judgt

Thus

This motion is in most Cases made after an issue is tried and a Verdict found. Few motions in arrest are made until after a Verdict. This however is not universally the Case. for the Judg[t] may be arrested after a default or after a demurrer tho' reversed, has been overruled. Neither is a good Cause for arresting Judg[t] a motion may be made in arrest after default for it was not necessary for the party to plead.

3 T. Rep. 380
Do — 393
2 Stra. 1271
Doug. 208
Do — 208
Do — 213
2 Burr. 700

According to the English practice Judg[t] is arrested for intrinsick Causes only. i.e. such Causes as appear on the face of the record. Causes of irregularity are to be taken advantage of by filing a bill of Exceptions to some interlocutory Judg[t] or the Opinion in some other way. When the declaration differs from the writ as if the writ sounds in Covenant and the declaration in Tort then Judg[t] must be arrested whatever the proceedings may have been because the writ will not authorize the Court to take notice of such a declaration. The Pl[ff] had no right to frame such a declaration because he was not authorized by the writ.

3 T. Rep. 393

So also when the Verdict differs materially from the issue. Judg[t] must be arrested. as when this is the Case the issue is not found either way.

There can be no such thing as an issue found where there is a material difference between the Verdict and the issue and where there is no issue found there can be no Judg[t]. The Judg[t] follows from an application of the Law to facts. but when no-

found. Consequently there can be no Judg.

This subject is in Hawkins's Pl. alledges
3 Bac. Abr. 393 that the Defft. said (being a Merchant) I will
be a Bankrupt. The Jury find that he said "he
will be a Bankrupt" This Verdict immaterially
differs from the issue. If the Jury had expressly
negatived the issue between the parties and
found as they did it would have been good.

3 Bac. Abr. 393 So if the Defts. declaration is altogether insufficient and he has obtained a Verdict & Judg., will
be arrested because he shall have no right of action
& Verdict can find only the truth of the facts contained in the Declaration. Therefore the declaration
being false, the facts don't disclose a right of recovery.
Consequently the Ct. cannot give Judg.

Barclay 378 So on the other hand if the Defts. plea and shew
3 Bac. Abr. 395 he has obtained a Verdict before, no legal defence
to the action, Judg. may be arrested by the Pltf.
Pltf. sues on an action of Debt, the Defft. pleads "not
guilty" and the issue is found against him. The
finding shows nothing material in the case
finding that he is not guilty is not finding that he
is not indebted. So if the Verdict that he has always
been ready to pay and that the Pltf. has never called
upon him. Judg. for the same reason may be
arrested after a Verdict against him.

The only difficulty under this head is the
application of the Gen. Rule to particular Cases of
Error endeavoured to explain the Rule by Cases

in B.R.

cases the General rule is various forms,

The material enquiry then is for what kind of defects in the Pleadings Judgt may be arrested.

It is a Genl maxim universal rule that after Verdict Judgt may be arrested for any cause which after Verdict and Judgt may be assigned for Error. This rule is of much consequence because if you find in a particular case a defect which may be assigned for error after Verdict and Judgt you are certain it may be made the ground of a motion in arrest of Judgt The question then arises what defects in the Pleadings after Judgt and Verdict may be assigned for error?

2 Roll 716
Salk 77
5 Cans 174

It is a Genl rule that if the Statement of the Plfts title or cause of action (and that only) is defective the declaration is aided by the Verdict altho it would be ill on Genl demurrer But if his title or cause of action appears itself to be defective it is not aided by Verdict

Suppose in an action of Trespass the Plfts charge the trespass all vi et armis he does not lay a day certain on which it was committed The question is whether this omission is aided by Verdict? It is said that it is because as it appears that the Deft has done an unlawful act by which the Plfts is damaged he is entitled to a recovery. The defect lies in the Statement of the title not in the title itself

But suppose in Trespass for taking away

his

his goods. the Defft steals neither the possession of nor property in the goods and a Verdict is found for the Plff. This defect cured by an Verdict? Clearly not. because the Ct cannot know this the defect is in the Statement. Suppose the Defft did take away a certain house of the value of 1000 Dolls. as laid in the declaration. Was it the property of the Plff or was it in his possession It does not appear and the Ct cant presume it because the Ct cannot know that any right of the Plff has been violated. Now then there is a defect in the Plffs title.

Again. An action of Slander is brot. agst. the Defd. for saying of the Plff. "you are a Thief" — A Verdict is found for the Plff. Is the defect cured by the Verdict? Clearly not for the Objection does not go to the Statement of the cause of action. but to the cause of action for the words are not actionable and therefore there is no ground of action.

Again. Suppose that in an action agst. the indorser of a Bill of Exchange the Plff does not allege in his declaration that he has given notice of non payment by the drawee. This is essential to the Plffs right of action. Now is this defect aided by a Verdict? No. for it is title of the Ct. Again. If any one Ct cannot be presumed that the fact of having given notice existed and the want of it is a want of title as appears in his declaration

The same distinction applicable to the Dec-

1 Doug 658
1 Bac 184
Cowper 825
Salk 365
2 Bl. Rep 820
½ Strg 1023
Plowden 202
3 Atkins 364
Cro Eliz 377
Carth 389
Ld Raym 232
Dec. not aided on Verdict
Cro Eliz 98
1 Sid 8
not Case
Salkeld

Declaration of the Pltf. apply to the defence pleaded by the Defts. If the Statement of the defence of the Defts only is defective a Verdict will cure it. But if the defence itself is defective a Verdict will not aid it

Thus if to an action of Debt the Defts plead not guilty, and Verdict is found for them. This is a defect in the defence itself. But if the plea be "accord and Satisfaction" and omits to state the day on which it was made and executed, and a Verdict is found for him the defect is no ground for a motion in arrest because the Jury have found that there really has been an accord and Satisfaction

Another general and universal Rule is that any defect in the pleading which would support a motion in arrest of Judg[t] must be such as would be fatal on Gen[l] Demurrer

But this Rule does not hold "e Converso" for it is by no means a rule that whatever will support a Gen[l] demurrer will support a motion in arrest because the Verdict cures many defects which on Gen[l] Demurrer would be fatal

And the reason why this rule does not hold "e Converso" is that if the Declaration omits some particular circumstance without stating which the Party obtaining the Verdict ought not to have obtained it but which fact omitted is included from the facts stated. The defect is aided by Verdict because the Jury are presumed to have found

Salk. 323
Bull[N] P. 305
Salk. 365
Cro Eliz 778
Cro Car[s] 297
4 T.R. 472
1 Wms 292
1 T.R. 545
3 Burr 1728
7 T.R. 578
Salk. 130
Carth 389

3 B & Ald 393
Ld[o] 399
5 Barn 190
5 Burr

Espinasse 407 found that fact. Thus if in Trespass or Trover the
Cas Ab 389 Plff omits to state the Value of the Good taken
Co Litt 44 or converted this Declaration is ill and demurrable
because there is no rule of damages but if issue
is taken and Verdict is found for the Plff the defect
is cured because the Jury by their Verdict have
ascertained the fact omitted. In other words the
Plff has proved the value of his Property converted by
the Deft & the value of the Goods was given in
evidence to the Jury

So where an Action
was brought upon
an Award & the
Declaration set out
the Award with-
out assigning the
breach the Defendt
demurred
Hutton 54
5 Bac 317
2 Wilson 370
10 Mod 301

Take the other case of Trespass laid without
any certainty if we go on the ground that it is ill on
Genl Demurrer. The only substantial reason why
the Day ought to be stated is that the Trespass may
be laid before the date of the Writ. It is certain
by Watson & Genl Demurrer. But after a Ver-
dict obtained in favour of the Plff the presump-
tion is that the Trespass was committed before the
date of the Writ because it cannot be presumed
that the Jury under the direction of the Ct would
have found the Deft guilty without the Trespass
had been committed before the date of the Writ

3 Com 394
Cart 130
Cro Eliz 389
Salk 130
Cro Jac 662
7 Rep 5 18
5 Bac 317
4 Com 2455

In other words the reason why the Verdict
cures defects is that after Verdict the Ct will
presume that all the facts not alleged but
which are entitled in those alleged and found
were proved to the Jury on Trial.

Hutton 54
10 Mod 301

As in the case of a Replevin pleaded with
out Cepit & Verdict. The Ct will presume a the
Verdict

Verdict that there was livery & seisin because a Fee[illegible] ... 6 Co Litt 303 b
Com Dig Ed G 6
Laws — 48
30 & 31 Car 2 c 82
Jenk Cent 3 Edit
p 318 pl 32
6 Doug 4 658
Cowp 827
Ray 48
1 Rich 145
1 Wilson 172

Fee[illegible] ... Fee[illegible] ... livery & seisin ... Fee[illegible] ... Fee[illegible] ... Fee[illegible]

fair presumption that they have not only found a Value but the Value

Cath 389 And if in his Declaration the Pltff should state a false day after the trial or Issue of pleading the defect would be aided by a Verdict because this is laying an impossible day, and laying an impossible day is in Law laying no day at all and then the Case comes within the Gen. Rule

5 Bac 317 Hutton 34 2 Wilson 370 10 Mod 301 If the grant of an Advowson is pleaded without averring that it was by Deed and it is found by the Jury the Court presume that it was by Deed because the grant of an Advowson can never exist except by Deed. It is presumed that the Court will never let any evidence go to the Jury which is imployed to prove the Grant of an Advowson was to be proved without Deed it would be improper evidence. Thus the Verdict is said to ascertain those facts which from the inaccuracy of the pleadings did not before appear

On the other hand nothing after Verdict can be presumed to have been proved except those facts which are alledged and those necessarily implied from them. Or nothing will be presumed which in point of fact was not necessary to warrant the pleading. Or in other words Tho nothing will be presumed to have been proved which it was not necessary to prove in proving the facts and

found. This rule in all its various modifications is nothing more than was laid down by Ld Mansfield in saying that a defective title can not be cured by a Verdict

But where the declaration is wholly void & not sustained. Issue is taken thereon & found for the Plff. In such case the defect is not aided because there is no fact to be presumed which can make the declaration good

As in Skinner & Gunston calling the Plff "a Newfoundland" is no foundation of a cause of action in favour of the Plff he cannot have Judgt because there is nothing which can be presumed which will shew that he has a cause of action. And if he claims Judgt he must declare on the ground of something presumed

So also if any fact is omitted which is essential to the right of action and which is not inferable from those facts stated and found this fact cannot be presumed to have been found, and the Verdict does not aid the fault.

This distinction in an action of Assumpsit or Covenant that performance of a condition precedent is not averred. The Genl issue is pleaded and a Verdict is found for the Plff. The declaration is bad and the Plff cannot have Judgt because the performance of the condition does not follow from the facts stated. The declaration contains a statement of the contract, and the non performance of it. These are found and found by the Jury but does this

3 Burr 1728.
2 Doug. 683
1 Salk 145

1 Salk 145

7 Cobbs 10.a
1 Salk 84.5
7 Mod 125
4 Do — 472
8 Do — 1248
2 Wms Saund 574
1 Bl H Bl 212

proved or was said to be presumption. Tak the Pltf has done what he ought to do? No- the things found furnish no evidence of the performance on the part of the Pltf. Indeed it is observable that the facts omitted in this case were not necessary to be proved to warrant the Jury in finding those facts which are stated. They find the facts which are alledged but the lack of performance on the part of the Pltf is altogether collateral to those alledged

Vide Tidd

2 Salk. 662
3 D.- 12

Again. - A sues B in an action on the Case for an injury done by an animal kept by the Deft and used to do a certain kind of mischief. But omits to state the Scienter in the Decl. The Jury find the Deft guilty They find the facts alledged viz that the Deft kept a Dog used to bite sheep and that he bit the Pltfs sheep But this does not prove that the Deft was knowing to the fact of his dog being used to bite sheep This is not inferable from the facts alledged and found by the Jury

Again - in an action agst the endorser of a Bill of Exchange the Pltf omits to state a demand of the acceptor or notice to the Endorser of the acceptors refusal to pay. The Deft pleads the Gen. issue and a verdict is found for the Pltf What facts do the Jury find? They find that the Deft was endorser and that the bill has not been paid. These facts have not proved that there has been a demand. They may have existed

Salk. 662
3 Salk. 12

a demand. But suppose he had stated a demand and refusal, but alledged no notice. Now notice Doug. 654
is absolutely necessary to entitle the Plff to an action. But suppose a demand and refusal does this prove that notice was given to the Indorser?
The existence of these facts does not at all prove that the other existed.

And it is very material here to observe that the Ct cannot on principle presume any fact omitted which in point of Law merely is necessary to support the Verdict. The Cond. Law of Scire facias must when duly of Scire, is not alledged, and is presumed is not an exception for the Defendant is the supposed thing pleaded

To presume after Verdict a fact omitted merely because it is necessary in point of Law to warrant the Verdict would be to presume on the idea that the Jury are Constitutional Judges of the Law. On this supposition every defect would be cured by Verdict and there would be no such thing known in our Law as a motion in arrest

Thus suppose in Assumpsit no Consideration is alledged in the Declaration. The Jury should find a Verdict in favour of the Plff Now the Consideration is not necessary in point of Law to warrant the Verdict in favour of the Plff The Jury did find only expending the Debt, did assume and promise, & that was a Consideration but it was not alledged in the Declaration. Pf Cannot a State-

ment

Vent. 2 Vol. 307 Statement of a Consideration was not necessary to warrant the Verdict finding as they did

But in point of Law he could not have assumed and promised unless there was a Consideration. The Verdict means only this that the Pltf has proved the matter alledged in his declaration

For Cowper the Pltf cannot have Judgt as the Ct cannot find in the Pltfs favour of Law unless they do (which was) to warrant the findings

Hutchs 400 In Comm. this point was decided otherwise & think it cannot be Law

Thus I have explained the two points on which a Verdict is said to be defective. I have taken the Case of an insufficient Declaration & not that of a plea to an insufficient plea when the Verdict is in favour of the Deft

2 Bac Abr 761 2 Str 1271 2 Wilson 171 Grant the rule I have taken it to be that a motion in arrest after a default or verdict for the Pltf or a demurrer to evidence or mild & pleades as Demurrer. Plead is nothing cured by these Cases for that is nothing taken for granted. The Ct cannot presume any thing not alledged because there is a Verdict in fact found

But it is to be observed that in these Cases Judgt cannot be entered for the greatest possible defects on the part of the Party who has this Verdict or new, tho nothing is cured by the Verdict

In these Cases the rule is this If the record is in favour of that Party who after the whole

proved

record, appears entitled to Judg^t he shall have Judg^t have on faulty the pleadings on the part on which the issue is taken may be 8 Coke 120

Suppose the declaration originally vicious and wholly insufficient in Law. The plea in bar is a frivolous one. Issue is taken on the plea in Bar and found for Plaintiff. The Court will not aid the plea in Bar but Plaintiff can have no Judg^t for as the declaration is originally defective the Pl^ff is not entitled to recover 2 Wms 1333 / 4 Bac. Ab. 131 / Hob. 50. 104 / 2 Ld Ray 1331 / 6 Mod. 180-1

A worthless plea in bar is good enough for a worthless declaration. The motion in arrest attacks the whole record and attaches on the first substantial defect which ever is in the Declaration. It must be absolutely for the Court Judg^t in favour of the Pl^ff and then again a Judg^t in favour of the Deft^t because the Pl^ffs declaration is insufficient

Suppose the Declaration is good the plea in Bar and replication bad issue is taken upon the replication and found for the Pl^ff Hob. 50 / 9 Coke 120 / 3 Lev. 244

Now the Deft^t cannot arrest the Judg^t The Verdict is to be drawn has not aided the replication but the Pl^ff shall have Judg^t for as the plea pleading on his part. There is no defence made to his claim. The replication is good enough for a frivolous plea in Bar. The motion in arrest attacks upon the first defect which appears and that is in the plea in Bar

And so the

of a Jury

And when Judg[t] is arrested in the nature of a Verdict in the Def[t] refuses to move it in favour of him who has obtained the Verdict Judg[t] in favour of him agst whom the Verdict is found may be immediately awarded for if the Verdict found against him the Verdict is found and he is on the whole record entitled to Judg[t] he may immediately have it notwithstanding the Verdict

Hob[t] 59
2 D[a] 199. 200
8 Cro[e] 120
2 D[a] —— 133
1 Bur 304

Thus if upon the Declaration is totally insufficient the Plea in Bar sufficient the insufficient the Plea in Bar is awarded and Verdict found for the Pl[ff] Judg[t] in arrest of the Record is awarded, and Judg[t] is entered for the Def[t] For tho it appears on the whole Record that the Def[t] is entitled to Judg[t] on the other must be entitled. The Pl[ff] is not because he has shewn no right of action. It must therefore be for the Def[t]

3 Bur 1901
2 D[a] —— 1906

Again if upon the Declaration good upon a Demurrer but the Plea in Bar frivolous and no replication good or bad and issue found for the Def[t] Judg[t] in arrest of the Verdict must be awarded and for the same reason for the Pl[ff] because there is no defence to the Declaration on the Record. Upon the whole Record the Pl[ff] is entitled to Judg[t]

But it does not happen that in all Cases the party in whose favour Judg[t] is awarded is entitled to Judg[t] for if the Verdict is found upon an immaterial issue so that the Ct cannot know from the Record upon which to award Judg[t] a Repleader

may

may be awarded on the Judgt being arrested. The Judgt is arrested and the Cause thus pleaded "good replication"

Thus in a Case before mentioned
In Debt on obligation to pay a Sum of money on or before a certain day, The Deft pleads that he paid before a certain day. The Plff traverses this allegation and Verdict is found for the Plff now the finding is that the Deft did not pay before but the certain day shews that he was allowed to pay at the day, and this he might have done. The issue then being immaterial Judgt would be arrested & the Cause ordered a repleader, & give the Plff an opportunity to take a material issue.

2 Blun 944
3 Blun 395
Lawes. 175-6
Stog. 994
2 Burr 1190
See Authors the Plff means in Debt on Bond payable at such a day Deft pleads on the said day he paid — 1 Ja and 3 223 2 Saund 319 6 Co 5 434

Repleaders

So also if the Defendant pleads in Bar and both good and the Plff traverses an immaterial part of the plea in Bar and has a Verdict a Repleader may be awarded because the issue determines nothing between the Parties. *

But if the plea in Bar is wholly insufficient and the Plff traverses the whole or only a part & there is no "Repleader" Judgt cannot be arrested, for it appears that no manner of taking the issue could have availed the Deft. for his plea in Bar was altogether insufficient, and if he was to take a new issue he could not take one more material and a "Repleader" is never to be awarded for a default which cannot in any manner . . . . .

1 Bl 304 6
8 Coke 120 6
D° — 133 6
Hob. 56
D° — 199
2 Blun 1230
* See Lawes in a action vs Husband & Wife & in a Replevin the Case stated the Husband they are not entitled to Damages their action
6 Co 5 5
Lawes 173

So

11 Coke 10
Salk. 173
2 Ray. 934

So if the Declaration is good the plea in Bar insufficient and the Plff take issue upon it and the Deft has a verdict Judgt will be and the Court there will be no occasion for a more material issue cannot be found than such a plea in Bar

Carthew 510
Salk. 173
D. 216. 5. 19
3 Mod. 395
1 Mod. 2

Or a repleader awarded that pleadings begin "de novo" at that stage of the pleadings where the first deviation from the rules of pleading occurred Thus if the plea in Bar is insufficient and the Plff traverses an immaterial part of it, and verdict is for the Deft Judgt will be arrested and a repleader awarded that the Plff may take a new traverse or otherwise answer to the plea in Bar

Doug. 380
Carthew 501
1 H. Bl. 644
1 Saund. 308
2 D. — 319
Carthew 501

But it seems a repleader is never awarded for the immateriality of the issue in favour of that party who tenders the issue. I know of no decision on the Books on this point but I take it to be Law

If then in the last case stated where the Plff took issue upon an immaterial part of a good plea in Bar and verdict had been found for the Deft the Plff could take no advantage of the fault. He might have made a better traverse and he admits what he does not traverse

2 Burr. 944
2 Wilson 173
3 Mod. 396

It is true to be observed that an issue may be immaterial if found in one way and immaterial if found in another. And hence it is that tho' an immaterial issue is an incurable defect, and not aided by Verdict yet an immaterial traverse is

is but matter of form and yet the issue is found upon the Traverse The latter is but matter of form because the party to whom it is tendered may always abandon it and a Traverse if found one way may be material and if found another may be immaterial

This presents a very strange case How the Traverse itself before Verdict is matter of form and yet the Verdict in some cases makes it an incurable defect. The finding may make it material.

If the Jury after finding a Verdict specially make a conclusion of their own, how the facts the Ct will not regard their conclusion but will give Judg[t] on the facts found without regard to the inference made. Thus if the question is made "whether A.B. died seised in fee" and the Jury find a special Verdict and conclude by inferring that "therefore he died seized in fee" this inference will be rejected as surplusage, and the Ct will form their opinion on the facts stated.

11 Coke 10
Hob[t] 53-4

Salk 198
5 Coke 52
Popham 42
6 Mod[n] 192

An Issue is never awarded after a demurrer It is only after an issue in fact, for by a demurrer the parties have put themselves upon the Ct.

In "Levins" a Contrary rule is laid down, but it is denied to be Law. An Issue is to be awarded by in those cases where the Ct cannot determine from the record for whom to render Judg[t] but here it is impossible for the Ct to render Judg[t] upon

Contra
3 Levinz 20
D[o] — 440

* Examination of the Law Cases & Authorities cited in the Margin of this Book to be continued -

Salk^d 579
6 Mod^a 2
Glasmanbanks vs Chester
Bayl Cases
Salk^d 219
Ib^d — 579
Comb 323
6 Mod^a 3

a demurrer * for the whole Record is to be submitted to them by the Parties.

If a Replea is awarded when it ought to be denied, or denied when it ought to be granted the Judg^t will be reversed. The awarding of a Repleader is matter of discretion

There can be no Repleader after a default or a Discontinuance for here is no issue. The question here will arise upon the whole Record who is entitled to Judg^t.

At C. Law Repleaders were sometimes awarded after Tryal; but since the Stat^e of Jeofails they are not awarded until after issue found because upon that Stat^e the finding may make the issue immaterial.

Salk^d 579.
6 Mod^a 2
3 Keb 664
1 Bac. 40
Ib^d — 103
6 Mod^a 2
Comb 371.
4 Leon 19
2 Saund 319
1 Bac^a 129
2 Levinz 12
6 Mod^a 102

If the issue is clearly immaterial it is obvious by and certainly so. It seems that even now a Repleader may be awarded after Tryal tho this is seldom if ever done

A Repleader can never be awarded on a Writt of Error because a Writ of Error has nothing to do but to declare how the Pleadings stand & who is entitled to Judg^t. Therefore if upon a Repleader it shall appear that a Repleader is improper, & a Repleader shall be awarded, or if upon a Writ of Error it shall appear that Judg^t ought to have been given for the Defendant instead of the Plaintiff, or that Judg^t ought to have been given for the Plaintiff instead of the Defendant, in either of these cases the Judg^t must be reversed.

Thus far of motions in Arrest and of Repleader for defects in the Pleadings.

2 Comb 111
6 Mod^a 22
1 Ventr 22
2 Mod^a 5
2 Sc Rep 582
2 Lev 1084

But Judg^t may be arrested for defects in the Record. So if the Jury find only part of the issue omitting what is material Judg^t cannot be entered upon it and a Venire de novo issues. For reason it in this case a material part of the facts on which Judg^t

Judgt. ought to be rendered must abide and the Ct. commence only on what is ascertained.

But this is not so if the thing omitted is immaterial: if it finds all the substance it is sufficient for then there is sufficient ground for rendering Judgt.

And as the omission of what is immaterial vitiates the Verdict. So also an immaterial variance between the Verdict and issue is good cause for arrest of Judgt. As if the Jury instead of finding the issue find what is foreign to the issue. So in case of a Bankrupt the issue being on the point of the Defts having said — the Plff is a Bankrupt &c and the Verdict found that he said "he will be a bankrupt"

But a Verdict which finds the issue is not vitiated by the finding of more than is contained in the issue. The latter is mere surplusage. The Judgt is not arrested according to the maxim "utile per inutile non vitiatur". Thus when the issue whether Ct. had effects. The Jury found that he had effects beyond Sea. The words "beyond Sea" were rejected as mere surplusage.

Third rule as to Special Verdicts. And as a special finds only the evidence of a fact material to the issue and not the fact itself Judgt will be arrested and a "Venire de novo" awarded. For a Court cannot make any inference of fact from evidence found upon the record. The duty of the assistance of facts is to ascertain the Law.

Hence

5 Bac 299
6 Co Eliz 133
Sing. P. 844
1 Burr. 227
1 Wms 27
12 Mod. 5

5 Bac 299
2 Rol. Ab 707
Do — 719
2 Wms 151
6 Co Ja. 40
6 Coke 57

6 Coke 57
6 Co Ja. 40
2 — 407
2 Rolle 719
5 & 2 Bac 299

* So if the Jury upon the issue in fact specially make a conclusion of Law out of the Court is not bound as Judges will be found to
Hob 116 Coke 10
5 Bac 380
Hobart 53-57

2 Barn 1243
10 Coke 56-7
1 Cark 111.
Ld Ld Dig. 590

Hence if in an action of Trover the Jury find a demand and refusal without any Conversion Here the Conversion is the gist of the action Now they cannot find facts which amount to a Conversion. They only find those which are evidence of a Conversion i.e. a demand and refusal are only facts from which they may infer the existence of the Q. may infer a Conversion

10 Coke 130
2 Bl. Rep. 8
2 Wilson 377.
2 Ves Jr 318
1 Bos & Pul. 329
Ld —— 331.
Doug. 3 Ed 362
2 Barnw. 7
1 Ld Raym. 508
Stra. 1094

And there are cases where the mode of assessing damages will destroy a Verdict and be a foundation for a motion in arrest

Thus if there are two Counts in a Declaration one good and one bad. and the Jury find a general Verdict and entire damages the Judg. will be arrested because it cannot appear to the Ct how great a part of the damages were assessed on the good Count and how great a part on the bad. At any rate the Ct cannot presume that they were all assessed on the good Count

1 Mod. 271.
2 Ld Raym 13
1 Salk —

And yet it is held & held that in the last case if not assessed the Declaration would be good on demurrer Gen. This is no exception to the general rule that whatever defect is ground of an arrest of Judg. must be such as would be bad on Gen. demurrer but this rule relates to defects in the Pleadings, but Judg. is not arrested in this case for a defect in the Pleadings but for a defect in the Verdict i.e. a wrong assessment of damages Thus Declaration would be good on demurrer because the Pff. by having one good Count stands on good ground of action But

But if several damages are assessed in this case on several Counts the Pff may release the damages assessed upon the bad Count and take Judg.t for those assessed upon the good. Thus if in one Count the Deft is charged with having said "he is a thief" and in another a "lyar" and the Jury find the Deft guilty and that he pay 50 Dolls on the first Count and 50 Dolls on the second the Pff may release the last 50 Dolls and take Judg.t for the other

Sufra

And tho the entire damages are assessed yet if no wideno was in fact given on the bad Count the Verdict may be amended from the minutes of the Ct so as to apply to the good Count and if the Verdict as given in by the Jury without being amended Judg.t will be arrested. This amendment however can be no otherwise made than by the Judges notes.

Doug.s 362
Shep.d 513 15
1 Levinz 134.

This rule with respect to two Counts is of no great practical use in Conn.t except as a principle or a principle for we seldom if ever admit two Counts. The principle is Penalties here and answered the same purpose as in England

For in Conn.t if a declaration consisting of one Count has two distinct Causes of action one sufficient and the other insufficient in Law and a general Verdict is found and entire damages Judg.t will be arrested. A plea in abatement where the Deft said at one time he was a "thief and at another a "lyar"

But

Stra. 346
D° — 433.

But still if different parts of that which is laid as one entire Cause of action is so that upon the record that one gives a Cause of action and one gives none Judg^t will not be arrested As if in Slander he says that Def^t said at the same time he is a Thief and a Lyar. He ought to state all the words said at the same time and the presumption then always is that the damages were assessed upon the actionable words

Doug^s 302
8 Mod. 504

When Judg^t is arrested in this case there is to be a "Venire de novo" awarded i.e. a Jury is to be called for the purpose of trying the Cause again But there is no repleader for the issue is right. The defect is in the Verdict and a repleader is never awarded when Judg^t is arrested for insufficiency of Verdict

2 Burr 985
2 Hawk 427
Salk. 384
Ld Ray^d 880
2 Doug^s 703

But I ought to have just laid down Cases not in their nature a reply to Criminal Prosecutions for if in any Criminal Prosecution there are two Counts one Count is good and another is bad Judg^t will not be arrested after a general Verdict because the Jury assess no damages. The Jury find the prisoner Guilty So in Civil Cases it is the province of the Jury to apportion the damages but in Criminal Cases it is the province of the Judge to apportion the punishment and the Court apportion the punishment on the good Count only.

These are the principal reasons for which Judg^t may be arrested according to the Common Law

of England tho' they are not all according to the English Law Judg[s] are not all only for intended Causes

But in Com[n] Judg[s] may be insulted for many attended Causes. As Corruption, man- Shirley 13
ifest partiality or misconduct of the Jury As if the D[o] 1733-4
Jury ask the opinion of the Judges, & find their Stig[s] 642
verdict upon the Case stated, upon a point of * In this the opinion Case, or the Jury their verdict upon the issue of any Chance, This is likewise a Cause for setting the Judg[s] aside in England in another way

Misbehaviour of the parties towards the Jury is also Cause for insulting Judg[s] As if one has 2 Bac 292
taken, used words or attempted to influence them 1 Vent[r] 195
or if the successful party has done it, about Co Litt 227
which the misconduct must be in him, and not Stig[s] 642
in the party who failed in the verdict. This Judg[s] will be set aside in England another way

So if one of the Jurors was interested in the Shirley 184
suit or was so related as to be the foundation D[o] 244
of a principal Challenge Judg[s] will be insulted.
May it has been decided in Com[n] Pleas if he is
so related to the land of the party who had land
in it, he could not be a Juror in case of the land
Judg[s] would be insulted.

Another Cause for insult of Judg[s] is when Shirley 166
the Jury or one of them has had before the
trator or Attorney in the same Cause or has given
an opinion upon it. All these would be ground

of

2 1787

of a peremptory challenge) amenable to the Civil Effects of the Common Law. And a Judge in such Case may be set aside on Challenge.

Another general rule as to incompetency & partiality is this. That incompetency goes to the Jurors impartiality and is good Cause for a peremptory challenge. It is a good Cause of Challenge for a Juror

Finch 83 Co. Lit. 133. 154. — But if the Juror is related to one of the parties within one of the degrees which make him incompetent it would go to his impartiality and exclude him. He is presumed to be biassed.

Finch 184. But any circumstance which would raise no presumption of partiality in a Juror is no Cause for a challenge to the Array. None but Lawful Men should be Freeholders. Suppose a Juror is not a Freeholder? The Verdict will not be set aside because the incompetency of the Juror could raise no presumption of his partiality.

2 Hawk. P. C. 332 Finch 168. And further, tho' the Juror is incompetent does go to his partiality, yet if the party aggrieved is ignorant of the incompetency or reason to make the challenge, the Verdict will not be set aside because he is presumed to have waived the challenge.

And for the same reason if one of the Jurors has tried the Cause in the Court below the party Cannot move for a new trial because a Juror of his own

set

set aside the Verdict because the Jurors who tried the Cause believed unfairly & [illegible] on the record and the Party could not be [illegible] them. Infra

A previous opinion formed upon a general knowledge of the Case involved in the Issue is no Cause for awarding a Venire de novo or even for a Challenge for every man who have a sort of [illegible] impression. Hardy 426

And it has been decided that if a previous opinion given upon the merits of the very Cause tried appears to have had no influence on giving the Verdict it is no Cause of awarding a Venire de novo Hardy 82. 2 Swift 232

And when the Fact was that one of the Jurors gave an opinion in favour of the prevailing Party and several years before the Trial upon him being interrogated on and what he had absolutely forgotten it, and when it further appeared that he was the last to give his opinion even after all the rest had agreed upon the Verdict it was decided to be no ground for arrest. Hardy Cases a dangerous decision says Mr Gould

But the a Venire may be awarded for a single Cause, yet the Court on a motion in arrest will never go into the evidence on which the Verdict was found, for that would be assuming the province of the Jury. Hardy 81. 82. 2 Dev 142. 2 Swift 264

By the way — in 2 Swift 264 there is a mistake. He says on a motion in arrest for misbehaviour in the Parties or Jurors all [illegible]

is

it awarded. This Court then, How must have meant a "Venire de novo" for that and defect in the proceedings.

5 Bac Ab 288. Pro. It is true that in England Judgt are
Do 291-2 entitled only for "intrinsic" causes, yet it is also
2 Levinz 205 true that in England Verdicts are set aside
Bunb 57. and Judgt entitled, for certain causes not ap-
Eng. C. 642 pearing in the proceedings, nor in the Verdict
— And this usage is effectual in England for
the same causes I have just been mentioning
Which does not appear on the record. How can
the proposition be consistent with the rule
that a Judge can be entitled only for intrinsic
causes. It is consistent. The mode of proceeding
is this. Upon enquiry into the facts the Judge
at Nisi Prius shall think upon the proceedings
— they then become intrinsic causes. The Court
the Judge in Bank enquires and finds on the record

5 Bac Ab 291 But in two cases in England the same pro-
1 Freeman 79 ceeding has been used in Bank. This is inconsistent
2 Jones 83. & is true with this general rule

Neither this one nor the other of these causes
5 & 3 Bac Ab 250 is the usual one in England. The usual way is
to have these extrinsic causes, the foundation of a
motion for a new trial.

Awarding Costs

On Judgt being entitled to Costs on regularly
allowed an action. To the party moving in
Bank

a writ might have demurred and prevented the delay and expence of a trial. The Ct is bound to pronounce Judg^t in his favour, for this is a matter of strict right. but Costs are not

Salk^d 579
2 Ventr 196
1 Str 207
1 Roll 69, 70
D^o — 572
Stra^d 617

And if a motion in arrest of Judg^t is overruled and the Plaintiff moving for a writ of Error on the ground that it was erroneously overruled & succeeds in Error. he recovers no Costs. not even those incurred in the Ct below. The Plff in Error never obtains Costs in the writ of Error, but he usually has those incurred in the Ct below. In this case he has not and the reason is he ought to have taken advantage of the defect earlier

Salkeld & Cowper 407

But the Genl rule is that no Costs and allowed. does not obtain when the Judg^t is arrested for cause originally existing not appearing on the pleadings wch are the record. The reason has not a little for it is not in fault for not taking advantage of a defect because it did not exist at the time

1 Roll 572
D^o — 417

Nor does the rule hold in cases, where the issue in fact is tried by the Court because under an issue in fact taken to the Ct and tried exception may be taken to the Pleadings (as) on a demurrer. Indeed when an issue in fact is given to the Ct there cannot be a motion in arrest. Advantage should be taken of an substantial defect under the issue. I think this with the Court. The Ct when finding the issue in fact must Judg^t immediately.

2 Swift 204

The

3 Bl. Com. 395 In England motions in arrest of Judg.t are made within the four first days of the next Term after Trial. They are made in Bank,

1 Rol. Rep. 572 In Conn.t motions in arrest of Judg.t must be made on the Records being entered upon it, and must be delivered to the Clerk or the Court Party, required to enter within 24 hours after Trial exclusive of Sunday. At any rate before the end of the Term. If this there are 24. hours or not remaining.

1 Swift's Dig. 235
1 Tidd's Pra. 572
3 Bl. Com. 393
4 Stat. at L. 187

1 Rol. Rep. 572 The form of a motion in arrest is. This — Tidd 572 after Verdict and before Judg.t entered Jam in Court moves the Ct. that the Verdict may be arrested for the Declaration is insufficient in Law. whereon to found Judg.t in the Pltf.s favour. If on the part of the Pltf. the same "mutatis mutandis"

New Trials

An application for a New Trial in England is always by motion. This motion is for a rule upon the adverse party to shew Cause why a New Trial should not be granted.

If a rule to shew Cause is granted the Judg.t is suspended, because the motion is made before Judg.t entered. The granting of a rule to shew Cause is not the granting a new trial, for after the rule is obtained the reasons for allowing a New Trial are discussed in Court.

The new Trial is granted then by making the rule absolute or refused by discharging it. The motion then only subsists the Judg, untill the rule is discharged. Untill making the rule absolute prevents the Judg from being entered. In England a new trial is always to be moved before Judg, but after Judg it cannot be set aside by a motion for a New Trial, yet it may be granted at any time before the Judg. Day. & Dong. 760

In Conn a motion for New Trial is usually made by petition and when application is made in this way, it is made after Judg for a petition can never be made at the same time with the Record made. The reason why applications are made in Conn is that formerly by new trials were not granted by our Courts of Justice. The application was to be made to the Legislature alone and that was to be done by petition. Afterward a Stat gave the power to the Supr and County Ct and the same mode of application continued. Under this Law, the same Court was pursued as was formerly from Judg by petition. Stat 28

It seems however that new Trials might have been obtained on motion as well as by petition after this Law. This is the distinction arising from the Structure of our System of Jurisprudence & practice that no application can for a new Trial may be obtained on Hinden 103

motion

motion must be made the next day of law
when otherwise.

Stat. 078. But now in consequence of a new rule of
Ct. made by the Judges of Ct. application may be
made for a new Trial in that Ct. by motion in
certain class of cases, viz in which case when
exceptions to the Verdict might have been taken
by a bill of Exceptions. For the rule of the Judges
of Ct. have determined that they will sign no bills
of exceptions in pursuance of a Stat. and leaving
the Judges of Ct. to make such rules of practice
as they think proper. When then the objection
to a Verdict is one which before the rule might
have been taken by a Bill of Exceptions it may
now be taken by a motion for a new Trial.

Time was formerly no time in Com. Law limited within which application for a new Trial
must have been made. In 1804 a Stat. of Limitations was made. Under this Stat. no application can be made for a New Trial except
within 3 years after the Judg.

In England the motion is to be made
within the four first days of the Term next
succeeding the Trial. The motion when there
must be made before Judg. and within 4 days
as above. In England when the application is
by Petition it must be made after Judg. and
within two years. When by motion it must
be

be made before Judg^t & unanimous a Judg^t cannot be set aside by motion

The petition in Cowp^r sets out the grounds of the application as any of the petitions said, The opposite party may plead to it, demur to it, or deny it But if he demurs to it and it is over ruled then is to be a trial on the merits for the Ct will not set aside a Judg^t of its own merely because a demurrer to the petition has been overruled

The bringing a pendency of this petition is no stay to the proceedings The granting of a new Trial setting the Judg^t but the pendency is no supersedeas

An application for a New Trial is according to the Genl rule an appeal to the discretion of the Ct The claim is not strictly legal and hence a new Trial will not in general be granted when justice appears to have been done by the Verdict, as tho it was done in a singular way Neither when the claim is very hard and unconscionable one will a New Trial be granted

I have known no case to allow the plea of pendency or the Statute of Limitations So when the party moving for a new Trial makes it appear by his own shewing that he is entitled to no Legal damages The Ct in their discretion will never minister to the gratification of mere

And as the granting of a New Trial is a great measure discretionary with the Ct the Attorney

3 Bac Abr 342
2 Bos & Pul 338
2 Str 1244
2 Wilson 306
Salk 644
3 East 451

on granting a New Trial in what terms & how the party claiming it Thus where a party against whom an application for a new Trial is made makes it probable that the party moving for a new trial is himself in possession of facts which will destroy his cause the Ct will not grant a new Trial unless the party will disclose on oath what he knows about the case So the Ct will refuse to grant new Trials in many cases unless the party moving will admit certain facts & Circumstances to be true

Salk. 648 So also they may lay any Condition Cumque hoc to found a Rule on but such Rule to stand right on the subject & in granting a New Trial they may say him under Conditions which under the Circumstances of the case appear just and reasonable as they may Compel him to allow old and inspimus Witnesses to be examined

3 Bl Com 391
1 Sid 335
2 Levinz 140 In England if the ground of the application is any thing which passed at the Trial the information on which the Ct is to act is taken from the Judges Report of the case but if it did not appear at the Trial it is to be established by affidavits

This rule has in general no application to our practice That rule applies in any case where the Trial is to be had before the County Ct because it has before the same Judge But in England the Trial is first had before a single at Nisi Prius

Before

"Beyond the Sup. Ct. this rule has an application in certain cases. "Where the motion is made to the Judge before whom judgment is given there is no reason for information from the Judge

"But where the point is reserved for the opinion of the whole Sup. Ct. the rule applies" There must be a report and the statement is made in writing and signed by the presiding Judge.

It is certainly true that error is not judicable of a decision of Sup. Ct. in granting or refusing a new trial for the granting is discretionary. Error is not in general judicable of a discretionary authority. But I conceive there is an exception to this. Cases where error wants the judicial test. Suppose a New Trial is granted in a case where from the nature it is not amendable any circumstances grantable error would be judicable of it. It is not that any case has occurred in England. But suppose a man indicted for a felony is acquitted and then on motion of the Attorney General a new trial should instead and he should be convicted this would be error. It is always true that error is not judicable of a decision of a Sup. Ct. in refusing a new trial.

Shirley 41

In Conn. a new trial in civil cases is not granted because the Stat. regulates the practice in the Sup. and County Cts

Stat. 28 Hardy. 9

As to the origine of the practice of granting

a motion for new Trials the Affidavits and Acts in the Books are much at variance.

3 Blackst. Rep. 58, 59 Blackstone, and those in the time
Stra. 695 of Edward 3d. who are of opinion that the
Salk. 648, Acts did not exist under the name of Counsels
1 Wilson 213 but were certainly existing before the time of the
2 Ken. 394-5 Protectorate. The Case in the time of Edward
3 Bac. Abr. 131 was for the mistaking of Terms. The Cases
in the time of Cromwell were for excessive
damages. Cases of excessive damages, caused
just suspicion of mistake in the Jurors. Some
other time many other Cases, made to grant
a New Trial.

1 Ken. 395 The Cases, where new Trials have been
Doug. 420 granted after a Trial at Bar. It was formerly sup-
Ed. Ray. 1360, posed that after a Trial at Bar there could be
Stra. 585 no new Trial, because it was tried before the
Dº 1105 same Judges, who had given rule to the application for a new Trial. Yet this reason did not appear in many Cases, for new Trials were often granted for mistakes of Jurors and the Jurors were often what the Act called not Jurors but mistaken in Jurors, and more than a Trial at Nisi Prius. But Cases can now be shewn, where New Trials are granted after a Trial at Bar. Trials at Bar were taken from the Records in Chancery under and pursuant to the Act and it did not originally with them. The reasons for granting them are great Value of the Debts, length of time, instruction, the great difficulty attending it,

and

And in general it is a maxim or standing rule that in all Cases of Suffrance wherein a new Trial may be granted if it can be made to appear that Injustice has been done at the former Trial. And there are some Cases where for reasons of publick Policy this rule will not apply as when the Debt has been sued after it has actually paid the debt, and the has lost his receipt, or discharge and afterwards has found it. a new trial will not be granted. The truth is a more general rule is that a new Trial will not be granted unless Injustice has been done

3 Burr 1388
4 Burr 3395
6 Mod 238

This general rule will require that the Case be of sufficient importance for when the Case is of small Consequence a new Trial will not in general be granted.

4 Burr 2093
Pl. 12. 395
Do — 655
4 Mod 358

And it seems to be a Gen.l rule in England that a motion for a new Trial cannot be made after a motion in arrest is made except when the Cause for moving a new Trial was unknown at the time of moving in arrest

Salk 647
2 Bl. R. 825-6

The reason of the thing appears to me, to be the other way. Suppose the motion in arrest not to succeed why ought not a motion for a new Trial to be made? (i.e.) if the party is entitled to it?

And for this there seems to be two reasons assigned the one reason why the other way for if a new Trial actually takes place and still there may be a motion in arrest of Judg.t after that. I think the motion

in

in arrest of Judg^t ought to be tried first because
why should a new Trial be granted when a mo-
tion in arrest if well founded would make the
motion for a new Trial perfectly useless

3 Salk^d 302
3 Mod^d 310
12 Mod^d 275
Stra^d 814
2 Ld Ray^d 1360
6 Bac Abr^d 638

It has been holden that where there are
several Defendants and all of them have been ac-
quitted or part acquitted and part Convicted no
new Trial Could be granted as to one, or any
number short of the whole because it is said
the Verdict must stand entire or fall so.

page 304

This rule if it should stand would work great
injustice for suppose one is Convicted and one is ac-
quitted there never Could be a new Trial for if
all the parties in the record or one of 'em must
join in a new Trial where Convict. none, where one
is acquitted because he Cannot petition for a
new Trial, The rule is Clearly an inexpedient
one and Lately it has been denied.

The Causes, for granting new Trials are gen^l
various, & will, not admit Clear rules of Law

Salk^d 646
2 Ld Ray^d 1535. 1428,
7 Bac Abr^d 327

1st The want of legal notice to the Defen^t
in an action is a good Cause why he should ob-
tain a new Trial The Genl rule of the Court
is that a party must have 15 days notice in a
Civil action, See Cases 12 and 14 Geo 2 and
Now if he has not had this due notice and he does
not appear, and judg^t goes against him and he
applies the damages &c may obtain a new Trial

But if he appears and defends this cause the
defect of notice the want also of exception to it
and cannot afterwards obtain a new Trial.

And this is such a case where the Ct
cannot in its discretion refuse the granting a
new Trial. Suppose the Deft has no notice at all
The Sheriff makes a false return. I appeal
here he would be entitled to a new Trial, and
conceive he has at any rate a liberty of being
heard. A man has an unquestionable right
to take advantage of every legal defence, and
as he has once been cheated out of it he ought
to have the opportunity by a new Trial.

2nd A new Trial may be granted for 11 Mod. 119
a defect or mistake of the Judge before whom 12 D. 302
the Verdict is obtained. As when the Judge is 4 Bac. 753
so interested in the question as to be incapable 3 Bl. R. 327
of judging: so when he admits improper 5 Bac. 344
evidence, or misdirects the
Jury in point of Law. These are mistakes
for which a new Trial may be granted

But tho' the admission by the Judge of 15 Rep. 77
improper evidence objected to is ground for a
new Trial, yet the admission of an incompetent
witness if not objected to at the Trial
is not a ground for a new Trial even tho' the
fact of the incompetency was then at the
time of the Trial. It may have its weight
with other reasons.

But

Parmele 88. Sand & Sul. C. 1790

But in 1790 one Sup. Ct. allowed a new Trial upon this sole ground and the evidence not objected to was strictly considered. This is a much stronger case than that communicated in these Books

3d Defect or incompetency in the Jury are 5 Bac 240 7 Mod 54. 1 Vent 30. 2 Lev 129 good causes for new Trials. Defect and incompetency mean the same thing

But if the incompetency were such as might have been ground of challenge and the fact was known in season to take advantage of it in that way it will not be ground for a new Trial. Semble if not known in season to challenge In a case in Ld Hild a new Trial was refused but it was because the incompetency was known at the time of Trial

In such Case in Conn. motion in arrest of Judg. is commenced with granting a new Trial In England it is generally taken advantage of by New Trial.

4th So the misconduct of the Jury. as- 8 Eng. 542. 2 Bac. 57 2. Lucas 140 5 Bac 250 Do. 288 facially. inattention or the like is ground for a New Trial. So if they refer the decision to a game of chance. Indeed any thing that reveals fairness of Trial is ground for a new Trial.

It is not necessary that all the Jurors should have been guilty of misbehaviour. misbehaviour one is sufficient. Somewhere the Foreman had sent the Jury should now have a verdict let him do

and

(reasoned what evidence he would. I say the verdict
of a majority is sufficient to vitiate the verdict. Salk. 645
for unanimity is necessary in the Jury.

In early times perfect unanimity in the 2 Roll. Rep. 375-6
Jury was not required, but for a long time past it
has been necessary both in England & in this Country.

If the Jurors agree the Jurors are sacked & bound
with the Attila they go. This has never been
done in the United States, and it is not necessary to
be done in England. In the danger of [illegible]
induced unanimity. If not unanimous the
verdict is bad and must be set aside. So if it is
the verdict of eleven it is bad. It must appear
affirmatively to be that of all the Jury.

But an effectual has been resorted to Comb. 14.
to undo the ingenuity of the rule. Viz by taking 5 Bac. Ab. 257.
the majority come in silent and acquiesce in 2d Ed. 291.
the verdict, and stand mute if they dissent, and Thilby 141
the Law will not retrofy them dissent after the 6 Da. 415
verdict is recorded. 2 Saund. 263.

In England the Jury when retiring to agree Lee Ray. 148
in a verdict are sacked up till they agree. 1 Bulst. 141
And after they are sacked up talking or drinking 1 Sid. 22
before the verdict is delivered to the Judge is 3 Keb. 577
misbehaviour. This is to combine an agreement. 1 Vent. 35. 135

Yet the verdict is not vitiated by the Jury's
talking and drinking. It is only misbehaviour that
under them liable to be fined - it does not go to the
fairness of the verdict.

324

Mod. Ca. 272
2d Do. 227
Mod. Ca. 25
12 Mod. 111.

But if the Jury eat and drink at the expence of either of the parties and the Verdict is in favour of that party it will be bad and a new Trial may be obtained

But to mind the Jury from the hardship arising from the rule as to abstinence from eating and drinking Jurys Verdicts have been divided The Nobility & they are not allowed wood or Candles.

Raym 241
2 Lev 217
3 Mod 377
5 Mod. 282

Privy Verdicts are delivered out of Ct to the Judges But these are not binding. The Jury may vary from it when they deliver their Public Verdict. So it is only a mode of evading the rule by complying with it formally.

1 Mod. 125

The delivery of Privy Verdicts had this effect viz if they eat or drunk after delivering a Privy Verdict it does not vitiate them, Verdict was as if they afterwards change it in favour of the party who procured the food

Hob. 193
1 Mod. 67
2 Mod. 68
2 Do. 69

But Privy Verdicts are never allowed in Cases of Felony in Cases of life or member And ever since the Jurors departure from the Bar is reckoned as part of their Conviction. Indeed if Conclude when departed in Open Court as this thing and they like it Court do give for as such Cases the Jurors departure from the Bar is reckoned. Second there is more fear if it is shut. So in such Cases as these the Jurors must be confined till they agree.

In Cases

In Court Special Verdicts are not favourd for the Jury are not confined at all, This Caution is dangerous in Cases where there is a Special Verdict

It is said in Bunny's case Rep. 148, that a Jury may found a Verdict on their own Knowledge & knowledge. This cannot be Law. If the had any knowledge on the subject he ought to make it known in Open Ct and if not the Verdict is bad. The reason is each party has a right to cross-examine and to controul any evidence by Com Law any testimony.

3 Bac Com 374-5
1 Sid 133
5 Bac 284
M Rally 238

And in pursuance of the same principle the Jury have no right to re-examine any Witness after retiring, not to ask him to what he did testify before, for he may not give a true answer. If they do thus examine it is ground of a new Trial,

6 Co Eliz 189
D° — 411
5 Bac 288

And in England it is a rule that the Jury can not take out any written evidence as Usually exhibited in Open Ct without the consent of the Parties or Judge. Holt says if the writing furnished evidence both sides the Verdict is good otherwise not good This leaves the rule loose. The evidence may be strong on one side and light on the other. I incline & think the Party ought to have a right to deliver to the Jury the evidence which was exhibited in Ct for they understand it better by perusing it & the Court the written evidence just to the Jury as matters of Law.

1 Ant 227
6 Co Eliz 411
2 Ld Ray 1478
12 Mod 250

Bak

But if the Jury take with them any written
1 Salk 285 evidence not exhibited at the Trial the Verdict
is bad here and in England and a new Trial must
be granted. They have no right to found a Verdict
on evidence not exhibited. tot hoc Cur.

But tho' the Jurors misbehaviour vitiates
2 Roll Rep. 11 the Verdict, yet they have no right to take the fact
2 Inst Eliz 189. Formerly it was otherwise. I do not see the reason of
5 Bac 288. this, for to influence this and Verdict does not prove
perjury. but only proves a breach of a promissory oath
an oath of office. In other Cases a man may
testify agst himself if he will but in this Case he
is not allowed In all these Cases motions
in arrest of Judgt are Consonant with New Trials.

5th It may be a ground tho' not always
of a new Trial, for the Jury to find a general Verdict
when directed by the Ct to find a Special one, The
reason of granting a Special Verdict is to let the Ct
have the naked facts that they may advise by the Law

Yet this is not a misdemeanor and therefore
the Jury are not criminable tho' they may find a
general Verdict if they please, tis not illegal,
But if they find the Law as the Ct thinks they
ought to a new Trial will not be granted tho' a Gen
Verdict was found when they were ordered to find a
Special one
1 Vaughan 333 tho' it seems if the finders advised
5 Bac 251. Counsel to Law that is the ground of a New Trial
Salk 287 and not the finders a Gen Verdict when directed to

to find a Special one. In one case a New Trial was refused but that was after a Trial at Bar

6th A Verdict being Contrary to Evidence is a ground for a new Trial in England and in Conn.t though Sayer says otherwise. Indeed there formerly was a doubt about it. But it is now settled that it is the Law in Conn.t

7th The Ct being fully & strongly inclined in favour of the 5th & 6th reasons for a new Trial. Issued the rule nisi but that it must be so that no evidence be admitted more than amounts to any thing in favour of the party for whom the Verdict is found. But as if the Verdict is clearly against the weight of evidence a new Trial will be granted

So when the scales of evidence are nearly equal were will be granted. But when there is great inequality a new Trial will be granted tho' there be some little evidence on the other side

Case in 3 Bls. Rs. 326-7
2 Stra. 1105.
2 D.o 1162
3 Burr. 1942

This has been much Controverted on this point for it is said the Jury are the proper Judges of the evidence; and therefore it is said the Ct assume the province of a Jury in allowing a new Trial then But I think it is not true. for they do not assume the power of trying the issue themselves. No they only refer it to another Jury to try the matter over again

7th If the Jury have given a Verdict on a

mere

Salk. 648 misdirection in point of Law, or generally agt.
Stra. 425 Law a new Trial may be granted. So if the Jury
2 Ld. Ray. 445 pass w.h.d the Jury find facts they make wrong
2 Barn 1078 Conclusion from them. So if on action agt. the
Comb. 404 Indorsee of a Ly Promissory Note, and no Proof of notice
4 Mod. 470 having been given to the Deft. Jurors may tell
2 Show. 147 no & provided they find for the Plt.

In some Cases applications of this kind have been
mis-understood, but it was because the Ct. were not
satisfied that this was the Case

5 Bac. Ab. 467 But a new Trial will not be granted, Court
4 Burr. 2093 when the ground of the application is very hard
4 Mod. 378 If the Ct. think that substantial justice has
2 Str. 582 been done a new will be granted. So w.h.d the
Plt. is entitled only to nominal damages. But
I think it is for the Deft. For a new Trial is granted
to obtain the ends of Justice only

8th In certain Case small sum of damages is
a cause for a new Trial. But this is made in Con-
tracts, where a Clear rule of damages is known
No Case where the action is in Tort and dam-
ages are precarious where a new Trial is
granted

So in an action on Bond, the Jury
should not make allowance for interest a
new Trial would be granted

Stra. 940 But on Malicious Prosecution & slander for
2 Bl. R. 827 w.h. no new Trial is granted yet I should think in
4 Burr. 655 some hard Cases new Trials might be granted tho

the

the action sounds in Tort. But there is no case of that kind. Indeed in one case the C.B. said there was no reason why a new Trial should not be granted as well there as in other cases. 2 Burr 1354 Stg. 425 D°. 1259

9th Excessiveness of damages is a ground for a new Trial both in Contracts and Torts. If so why not for Smallness of damages. Indeed formerly it was tho't no new Trial could be had for excessiveness of Damages but that doctrine has been long exploded. 2 Bl. Rep. 937. Stils. 462 1 Burr 609 D°. 1846 1 Str. 277 D°. 257 4 D°. 657 7 D°. 529

When new Trials were first granted on this ground it was tho't to be on the ground of partiality presumed. But now that is not supposed in many cases to be any partiality and yet New Trials are granted. In Com. a new Trial has been granted under these circumstances, A sued B. for Debt and told the Deft that damages were laid only to the amount of 50 Dolls. so the Deft let it go by default and the Pltf took out 100 Dolls damages. This is exceptious and besides it is misconduct.

In some cases of very great damages. no new Trial is granted. So in actions for "Crim Con". The opinion has been that in such cases a new Trial cannot be obtained. But why not as well as in case of Battery? To be sure there is more of a rule of damages furnished in the case of battery than in case of "Crim Con" as, 1 Burr 609 4 Burr 2. 651 5 D°. 257.

as to loss of time, and Buller in one case says it might be granted even in this case. Then you limit the sum in question. In case of battery the damages by way of smart money can never be exercised. It is analogous to Crim Con

1 T R 271 But in cases of Assault and battery a
5 D° — 257 new Trial may be granted. In case of action
2 D° — 161 "per quod servitium amisit" for injury
2 Wilson 18 to the P[ltf] any sum the damages can never be
exercised. Here the same observations "at supra
might be applied. I see no reason why a new
Trial may not be granted in both Cases.

Salk 644 New Trials may be granted in Cases of
1 Burr 394 Slander. The Cases of Slander have been gen-
1 T R 271 erally when there was misconduct in the Jury
So in Stiles 462. But it's generally agreed to be
as I've stated.

Ld Camden has strongly contended more
2 Wilson 205 or two cases that Judges ought not to grant a new
6 D° — 244 Trial in Case of Torts, unless the damages are so
Enormously exorbitant as must outrageously exceed.
He says it is substituting the Ct for the Jury. But
this observation would apply in Case of Verdict
contrary to evidence. But he allows that in
such a Case New Trials may be granted.
Camden has been frequently the mouth of a
Statesman than a Judge in his observations. He
wants always to be misunderstood. The rule is

was settled agst. his opinion

If by a mistake in the Jury in point of 2 Str. 1113
computation the Pff moves too much a new 2d. — 1123
Trial will be granted. So if on Bond they calcu- Carth. 571
late interest wrong But the Pff may 2 Wilson 262
prevent a new Trial by releasing the excess. 1 Ea. 364

Where one said the mistake of Counsel in Stat. 28
pleading a wrong plea is a ground for a new 2 Str. 1131
Trial. This is what is called in our Law mis 1 Salk. 402. 3
pleading. I don't find that a new Trial has been
granted for this point said in England. the
Justices Bullr says in a certain case where the
effect of the plea was misconceived by the Court
& the Ct. that it ought to be ground for a new
Trial. It ought to be more general in Cont. page 208.
than in England. because here a party can
plead but one plea; but in England upon the
Stat. of Anne, a party may plead many pleas

And it is clear that the neglect of the 2 Str. 1122
Counsel is not a ground for a new Trial. The Salk. 645
remedy of the party is agst. the Attorney

I doubt whether in Cont. a new Trial would
be granted for mispleading when the defence 1 Bac. Abr. 512
is an unconscientious one as Usury and Stat. of
limitations In England in a very modern case
the Ct. refused to postpone a trial because the
Issue was an unconscientious one viz Usury.

When

Rodt 573
2 Swift 271

When an application is made on this ground in Cont. the Petition must state the plea or defence which he is to make that the Ct may see whether it is sufficient, and must also state that he is able to prove it

5 Bac. 252
11 Mod. 1
6 D. 22

That a material witness was absent at the first trial this inevitable accident or misfortune is a good cause for a new Trial. As if he was prevented from attending by age, sudden illness or by any thing which is clearly a reasonable and sufficient excuse for not attending

Salk. 645

But a new Trial will not be granted for this cause unless in the Petition the witness will make affidavit of what he knows that the Ct may see whether it is material and likely effect the issue

In Cont. the Petition states the testimony which the witness will give and before the Petition is granted the witness must state what he knows either by deposition or viva voce as in common cases.

5 Bac. 252
11 Mod. 141

Again the absence of a material witness when occasioned by the contrivance or practice of the opposite party is cause for a new Trial Not to grant a new Trial in this case would be to allow a party to take advantage of his own iniquity. But wilful absence of a witness or to serve his own negligence is no ground for a new Trial

5 Bac. 251.
Salk. 653

And

And a new Trial is never granted for the absence of a Witness whose testimony the party might have had by ordinary and diligence. Even he suffers in consequence of his own neglect. Salk. 647. Str. 691 9 Mod. 98 3 Bac. 252

Unless surprized or misled by the intimation of unexpected evidence ought not to be ground for a new Trial. This is the English rule. Nor is a mistake made by a material Witness a ground for a new Trial. The reason is it is thought dangerous to grant a new Trial after the cause had understood all the evidence on the other side to have an opportunity to amend or shape the evidence according to the exigency of the case. Salk. 649 Str. 691

Our Ct have in repeated instances granted new Trials when the material Witness has made a mistake and it could be proved.

Another ground for a New Trial in Cases is the discovery of new evidence which is material & is so much explained by Salk. 78. and it is said in the case that it is a ground for a new Trial in Ejectment but not in Cases but the contrary is the other way. 12 Mod. 584 5 Bac. 252

The Cts in England proceed upon the ground that it is dangerous Country as in the Case above. 7 Mod. 89 2 Bl. 269

But a new Trial will not be granted in such a Case unless the Ct are satisfied that the evidence is material and that it is newly discovered, for if by common diligence the party could have known

and

and obtained the evidence before it is no ground for a New Trial

Whitby 283
1 Rol. 89
2 Swift 270

A petition for a new Trial on this ground must state what the evidence is (i.e.) the substance of what was before given and also must name the witnesses that not all the witnesses if those named so swith testify

Bun 394-5
Salk. 653
12 Mod. 584
Pas. 8 W. 194

If the cause has been tried by the testimony of a witness legally infamous and that was unknown to the party agst. whom it was used as evidence a new Trial is granted on English Issues and on our own. This is settled in the English Books. There is a case in Salkeld where the Court refused but it was upon the ground of knowledge in the party. The Ct. of Chr. usually allow New Trials in a Ct. of Law in this direction. This is not necessary. The common practice is now out of use. The reason is he has tried it by illegal evidence which he did not know was illegal at the time

Misconduct of Jurors is in certain cases a ground for a new Trial. If one party treats the Jurors or the Solicitor is found to find fault with or make any representation to the Jury in his own favour. This are all Causes.

11 Mod. 141
2 Vent. 173
1 Vent. 125
1 Bac. 262
1 Rom. 140

So also if the Attorney of the successful party is guilty of improper conduct towards the Jury. And in general any kind of embracery or any attempts made to influence the Jury is good

good cause for a new Trial

It was formerly holden that new Trials were not grantable in actions of Ejectment. because a Judgt in an action of Ejectment is not Conclusive between the parties. and of Course a new action may be brot. The reason is the parties are all strangers. and so are the proceedings

The rule now is that new Trials may be granted in Ejectment as well as in any other Cases if the Verdict is for the Plff. When it is for the Deft it will not be granted unless there is Something very particular or extraordinary in the Case

The reason of the distinction is if the Deft prevails the parties are "in Statu quo" but where the Plff prevails they cannot remain in Statu quo. because the Deftly reason of the Judgt is turned out of possession

It has formerly been said that after there has been two Several Verdicts between the same parties. and the determination the same way there ought not to be a new Trial This rule does not now exist for there may be after three Successive Verdicts in Pennsylvania

And it is a Gen. rule that new Trials are not grantable agt a Deft in Criminal Cases tho they are granted in his favour many times This is understood when the Verdict is Criminal — ous of the Criminal Law

Salk. 648.

Salk. 648
Salk. 650
4 Burr 2224
Stra. 1160
5 Burr 2534.

6 Mod. 22
Salk. 649
1 Sid. 330. 151
3 P. Wms. 58.
4 Burr 2108

Comyns 37
1 Roll. 86.

Standing

6 Mod 638 — According to English Law a new Trial is not granted in Criminal Cases in favour of the Deft. In all Criminal Cases when the offence is higher than a misdemeanor no new Trial is grantable on either side

6 Mod 638 — But when the offence is no higher than
Stg. 698 — a misdemeanor a Ct may grant a new Trial in
Doug. 1012 — favour of a Deft. as for Libels - breach of the peace
2 Ray. 63 — Perjury &c
Doug. 696 — It is indeed a Maxim in Law that no
5 Burr 2667 — man by shall twice be put in jeopardy of his life
1 East. 154 — In Corp. new Trials are granted in favour of the
1 Rol 86 — Deft as well in Cases of Felony as in other Cases
and this is the rule under the Laws of the United States

Stg. 899 — But what the offence must exceed a mis-
2 Ld Raym 1234 — demeanor it seems to be the rule that no new
2 Ld Ray 63 — Trial can be granted agst the Deft tho' it may
2 Str. 484 — be granted for him

1 Chan. 335 — To this rule there are two exceptions 4 Co
12 Mod 1 — The first is where the Deft has been acquitted in Con-
Stg. 1238 — sequence of a fraud practised by himself &c of
Salk. 646 — he has subborned Witnesses to swear with the Jury &c
12 Ray 83

2 Ld Raym 1524 — The second exception is where the acquittal has
1 Str. 653 — been obtained by the misdirection of the Judge in matter
5 Bac. Abr. 30 — of Law a new Trial will be granted agst the Deft. be-
cause he has been subject to a Conviction of the fact

1 Rol 867 — And in a Qui tam information a new Trial
cannot be granted for the avoid fact unless in favour

granting it a new Trial is granted for the Criminal
part Granting a new Trial in England and Contra supra
vacates the Judgt & the conditions may be insisted

As to Costs. When upon granting a 8 T R 619
new Trial in England the Costs are to abide the 3 D. 507
event of the suit. If the Party succeeds a second
time he shall have Costs on both Trials,

But if the other party succeeds on the 2 H Bl 639
second Trial he shall have Costs on the second Trial 2 D. 641
& only

In Contra it is the general & no, not
universal rule that the whole Costs abide
the event of the suit

Writs of Error

The principles found in the English decisions on writs of Error must be the same every where. But the mode of carrying them into execution is different in different Countries and different States. ... And is effected materially from the English mode by the principles as to remedial proceedings are the same

A writ of Error is said to be a commission directed to the Judges of a Court to examine the record of an inferior Court and if error appears to reverse the judgment and if none appears to affirm it. A judgment on a writ of Error cannot affect a judgment in a common suit. It cannot pass on a Default for the Court must learn themselves from the record whether it is erroneous. If the Defendant fails to appear the Court cannot reverse the judgment of Course and affirm it as in the case of an Default.

There are two kinds of Writs of Error
1st For Error in Law 2d For Error in fact

We shall be most conversant about the first, for it is the most common and most important. By the way however when they speak of an error in fact they do not speak of any error arising, fall dead and found by the Jury as the fact whether the Jury find that the Deft appeared and pleaded but they mean that there is some fact existing de hors the record which renders the record erroneous for

for no writ of Error lies for a wrong Judg^t unless it
appear on the record

For error in Law complained of, always ap-
pears on the record. The case is stated upon
the record and the point determined must there
appear as much as the whole case in a demurrer
to a declaration. And in all cases it must ap-
pear on the record and no enquiry can be made
out of it By the way, there are many things
which don't appear on the record, as a demurrer
to a declaration, which may be tryed upon the
record by a certain mode of proceeding to be
mentioned hereafter. Every wrong opinion of the
Ct may be tryed upon it

But writ of Error (for error in Law) does not
lie, for any matter dehors the record. No enqui-
ry can be made into any matter which is
extrinsick of the record So you see a writ of
Error may always be tryed when a Judg^t upon
a demurrer. I am now considering the Subject as tho' there was no appellate jurisdiction
at all and there are many cases where there is none

A question of Law may arise that does
not appear on the record and yet it may be
heard upon it and if it is a point of Error will
lie but then there is a motion in arrest for the
insufficiency of the Declaration. This lays the
foundation of a writ of Error The Ct admits
upon it -

a reject testimony often A Juror Bond offered as a Witness Objects to him on the ground of interest but the Ct admit him & Find that he was an interested Witness and writes the opinion of a Supreme Ct. This is part of the mode by a Bill of Exceptions to the opinion of the Ct stating that C was offered on the ground of the Petition, Action and the part of this admitted by the Ct. and in this way may any other opinion of the Ct as an opinion in giving a charge to the Jury be placed upon the mode viz by a Bill of Exceptions. and the Judge is bound to certify by his oath that this was the case. if it is stated truly. and if it is not he must state it himself

1 Rolle 760
Collier 035
1 Wilkes 39

This Writ of Error lies for any intermediate Judgt of the Ct tho you will observe that it can never be but a final Judgt intended As when the Ct overrule a plea in abatement Now the Deft cannot bring a Writ of Error until after a trial on the merits for this may be no need for it. but if on the trial he fails he may then bring a Writ of Error upon the opinion of the Ct in rendering Judgt against his plea in abatement

So in an action of Account Deft pleads in bar and Deft assumed. The Ct render Judgt and Computate No Writ of Error now lies. The question goes to Auditors and they award that the Deft

Deft is in arrear. Now the Deft may bring a Writ of Error on the Judgt & assign this plea in Bar

So in case of Partition no Writ of Error lies until the Writ of Partition issued and a return is made and Judgt moved by the Court on it for the Partition may be awarded according to the writ.

It is no Objection to a Deft bringing a Writ of Error that he made no defence. Nul tiel record is a default when there is a fault in the Declaration As where an action of Slander is brt for calling the Pltf a Villain. The Deft suffers a default & he may bring a Writ of Error and move that the Judgt for the Declaration is altogether insufficient

So if the Case had proceeded to Issue and he had made a defence. But had taken no exceptions to the defect in the Declaration. he might bring a Writ of Error afterwards & the Declaration was substantially defective. I am not now speaking of defects Cured by Verdict for then no Writ of Error lies. I am speaking of Declarations which contain substantial defects so that they would go out on a general demurrer or on a motion in arrest

And this rule applies to the Pleas of the Defendant as well as to the Declaration for you see the Issue must be immaterial &c. and no Case tried. As when Deft pleads

Nil dicit

Reddy. but does not state any in this plea. he only states a number of things which only amount to extention. The Plff instead of demurring to traverses them. and they are found in favour of the Deffts Now the Plff may reverse that Judg and this all appears upon the record

Plea is a rule which is to be noted that that is pleadable in abatement and not pleaded is not subject of Error. but if pleaded it is subject of error.

But true is the exception to it. for if the writ is utterly void so that no Judg can be rendred upon it in favour of the Plff the defect if not taken advantage of by plea in abatement is subject of

As if a Feme Covert bring an action in her own name and states in her declaration that she is married. and no plea in abatement is put in and Judg is rendred in her favour a writ of Error will lie

So if the Ct had no jurisdiction of the subject matter disputed a writ of Error lies

Another rule is to be observed. No person can bring a Writ of Error on a Judg except a party or privy to the record. and the privy must be one who has been injured by the Judg. As if A in Ejectment is about to Land and the tenant dies before a Writ of Error is brought. Now A can bring it. The person to whom the Land descends after the tenant dies by the Writ of Error has been named Heir. he must be both the heir and

representative of the deceased who is injured by it. If the Controversy is about personal property it must be brot by the Ex^rs or Adm^rs. If then is a Devisee of the Land he must bring the Writ of Error. K. Rolle, 747.

The principle extends further than mere representation. A sells Bargain & Land and Covenants the title. C sues B in ejectment to recover it. They go into a Course of Pleading and the Award is that C shall have the Land. B is injured by the Judg^t and he vouches in A to defend. Now B is said to have a power that he may bring a Writ of Error and reverse this Judg^t. K. Rolle 748

This principle may be explained further. Suppose A sues B to recover 40 acres of Land and 50£ damages. Suppose it goes in favour of B. now A dies. Who can bring a Writ of Error? Why clearly A's heir. But he will not do it. Then D may bring it who is the Ex^r for he is injured for the Suit is for personal as well as real property. And if C the heir should settle with B and give up all claim in that Judg^t then D may bring a Writ of Error for the damages are not released. Cro Eliz 558.

This principle goes still further. If there are many Defts than one the Genl rule is that all must join in the Writ of Error. But if but one is acquitted & the other Defts reverse it &c. there arises a difficulty. A sues B C and D and D is acquitted. B and C wish to reverse the Judg^t D objects this, for he says you are bringing me into

dif-

1 Lewin 210 difficulty again for the case may be so worded that
there may be another trial. The rule as to award
page 280, bills established that they have a right to reverse
the judg.t I find no case in the Books but one
& that was punished after reversal, the case stood
only agst the two.

This has been a question much litigated
in the Cts which yet remains doubtful. 4 Co 3
Bro Parl Cas 481 Whether Bail can bring a writ of Error towards
Carth 447, a Judg.t reversed agst the principal? If the
had been no case I should suppose the Court for
he is injured by the first judg.t if it was erroneous
for the Court to be no judg.t agst him as Bail.

There are however a variety of authorities agst
this which say he cannot reverse it. But he is as
much a party to the record as the principal mentioned before. A name of no record can affect
settled the point. The principle always is that
he is a party, not that he is actually a party
by name.

The proceedings in a reversal are different in different Cts Trinity, Easter & Michl
Term made the common case when a case was
moved from an inferior to a superior Ct the
record itself is carried up and not a transcript of
it. As in a case carried from C B to B R and
from this it follows that judg.t is entered in B R on
this record as it ought to have been in C B and
then a writ of Error upon it.

2dly

In Parliament it is not so. The record is not
carried up (except as matter of form) only a Transcript Cro Ja. 341
and if judgt is affirmed then the Ct below issues out
Exon on the judgt which they rendered. If it is reversed
the Ct below issues no Exon but renders judgt the other
way, for Parliament never renders the judgt.

When the record is carried up for "Scire Facias" Carth 41
(as they call it), it is "ad audiendum errores". This
is not usual for third Ct in error generally proceeds
without notice.

In this County nothing more is done than
to take out a Writ 12 days before hand stating all
the Errors, and it is read to the Deft in Error and
it comes before the Ct as any other case does. This
mode is fully extended, it is, that of the National Ct

The Ct of Exchequer in England is a Ct in
Statute only to try Errors. Writs of Error are
originally commenced in KB & Roll's Ct and
tried by the Barons of the Exchequer & writs of Error
lie from the Barons of the Exchequer to the KB

2nd Errors in fact. I will now take notice
of errors in fact.

The error in fact is not that out of the
record as Coverture, Infancy, and so on any other
when the Ct cannot proceed under judgt as they did
by reason of some fact existing. As where Deft
was out of the State that Pl was bound to continue
the Case one Term. So upon Scire Facias shall take
judgt and Exon the first Term & writs tried in

in

on this judg[t]. And the same is true if the Deft is a Citizen of the State but is absent from the State at the time of serving the writt.

But suppose the fact is denied that he lived in another State: and it is averd that the Deft was at home in Conn[t] at the time the suit was brot. How is the fact to be tried? Just like any other question of fact — by a Jury and the fact must be put in issue like any other fact. The Gen[l] Issue to a writ of Error is "in nullo est erratum". This you must not plead when you deny the error in fact: you must do it directly as any other denial of a fact.

Writt of Error may be brot before the same Ct that rendered the judg[t]. The judg[t] is not impeached by it for the writt of Error is grounded upon an error in fact not known to the Court. This is a writ of Error coram vobis — and the same Ct may correct the mistake.

I will now mention a general point which is very important. It is this by When judg[t] is rendered the Ct is to render such judg[t] as ought to be rendered upon the facts & law of the case. This is all that is ever done in a writt of Error. Such is the writt in this respect. Just so the appearance of a bill in Chy. Such a writt of Error is taken from C[t] to B[t]. A bot in action agst B. to recover damages was brought & tried & judg[t] was

ordered that Anonm 1002 & B with his Costs.
Being a Merit of Error and Juriall. What must
be known? The Principle is he means all that
he can Cast. Made what has Been Cast? This must
be ascertained and he means the amount upon
the Roll, as if he had paid the money upon
the Ex^on, this must be referred with Interest, from
the time he paid it

When a Judg^t is reversed for the Plff in Error
who was Plff in the original action the gen^l rule is
that the C^t above orders the same Judg^t that the C^t
below ought to have done. This is to be observed how-
ever that it is not always possible for the C^t above to
do this for it may be out of their power to summon
a Jury. In such a case the C^t below must render
the Judg^t which they ought to have rendered at first

This I believe is the case with all the Superior
Courts of Error in the U.S. They can summon
no Jury and can assess no damages.

This is the Character also of the Court of
Exchequer. Suppose in C.B. the Deft pleads in
abatement. The Writ is abated. A Merit of Error is
taken to B.R. they overrule the plea and award
the Judg^t they ordering a Judg^t of Respondeas ouster which
the C^t below ought to have done. But suppose B.R.
affirms the Judg^t of C.B. and a Merit of Error is taken
out to Exchequer Chamber and they reverse the Judg^t
Now how is the Case to be tried? It must go back
to the C^t from whence it was brought. This C^t of Exchequer

2 Saund 256
1 Salk 401
2 D^o 403 a 413
D^o — 202
Carth 80
Comyns 205
2 Rolle 774
2 D^o — 805
Comyns 442

1 Salk 403
2 D^o — 483
4 Mod 125

re

remedies exactly one hundred & four years.

Sappose we have a matter which is mere form in the U. States not differing in principle but in the mode of carrying into effect or execution. Ask is this. Suppose the reversal of the Deft. They tell you in the Books that the only judgt. undone is "quod recuperet" i.e. let it be reversed. This they say is all he wants. Ask you see if the Plff. has received money out of the Deft. he the Deft. would not be in "statu quo" by a mere judgt. reversed. Her take one is so far entitled that he may bring a Assumpsit for money had and received but this Considering a man to bring a suit to get his money

But suppose they tell Byron a writ of restitution is to issue directing a party to attend to turn the money. This is a mere fact yet it is not a part of the judgt. for that is only "quod recuperet" What is to be done if the party refuses to pay? I know not. Suppose he dies the proper party

In this Country the judgt. is not only a reversal but a restoration of the money which is a part of the judgt. and tho' if but no money has been paid the judgt. reversed is the same as in England except that no Deft. has his costs.

1 Vol. R. 588. However it seems agreeable to the English proceedings if the money has been paid over but is in the hands of the sheriff no writ of restitution

restitution issued but an order given to the Sheriff to bring it back

If Land was in Controversy and the Case to be tried by Jury & Judgt Nisi was reversed the Judgt would be quod Re and a Writ of restitution with an Ex. would immediately issue

If the man who has thus gotten possession of the Land sells it to a third person and writ of restitution issued agt the third person but a Scire Facias issued to call him in. He has no title to the Land. The great principle of reversal is, to put the party in the same situation he would have been. no Judgt can be undone which is to be done by the Supr Ct of Errors.

Jam nunc to speak of Judgt affirmed. but suppose a Judgt is affirmed by the Supr Ct of Errors what is it to be done? Do they issue an Ex.? No the Judgt is now declared to be finally good and to that Ct you must go for your Ex. What then is undone in Supr Ct of Errors? Why that the Judgt is affirmed. But then the Deft in Error says I am injured. I have lost the interest of my money one year. How shall he get it? he must be allowed to all that he has lost and the Court of Errors will issue an Ex. for it. But then there is another way. They may order Judgt for damages and Costs and issue Ex. for them. Judgt in Ejectment the writ of Error is in Comm. Pl. and from Comm. Pl. he cannot recover them.

1 Johns 261
6 Cr 442
Cath 253

2 Dallas 225
4 Mas. 127

Next

Nota. As to the question whether a writ of Error is a Supersedeas to an Ex.^on A writ of Error is a Supersedeas to the Ex.^on after the writ of Error has been allowed and delivered to the Clerk of Errors. This is given to know that an Exemplification may be given to everyone to find out whether an Ex.^on can be issued upon Error Judg.^t and 8 days are allowed. As to the same thing in another way. For when the writ of Error is signed by the Judge it is a Supersedeas of the Ex.^on if the Ex.^on is in the hands of an Officer and he has had no notice, he may levy it without being guilty of a Contempt. If he knew it he would be guilty of a Contempt. Thus it stood at C.L. They have now furnished a partial remedy to wit originating from the principle that a writ of Error is a Supersedeas from the time it issued. The evils were many. The authority of the Judges may all be gone before the writ of Error is determined and at this time they may issue Ex.^on get nothing by it. To prevent this evil they made a Statute declaring that in certain Cases a writ of Error shall not be a Supersedeas unless a bond was given to indemnify the Judges. The Court this bond is extended to all Cases. Note this bond will secure not any damages for the plaintiff in Error to take a good bondsman who may be sued and recovery had of all damages and Execution out of that if the principal be unable to pay.

Barnes 370
2 D.^o 200, 205
3. Lewin 142
1 Salk 321.

The Writ of Error then must be a Legal one
in England & observed it was extended to certain
Cases in Sweden they didn't make it universal

There is some uncertainty as it respects what
is Error. The authorities are Contradictory. One
thing seems certain. If the body of a man is
arrested and he is not actually lodged in Jail
but is on the way there, if the Writ of Error
cannot be discharged. This will always do
when a bail is given. But I doubt whether
it applies in England to those Cases where bail
are not required for it would be depriving a
man of his liberty.

They told you this is a true position which Burns 212
is disputed and Contradicted by an Author that if 2 Bacon 491
goods are taken by a Sheriff and he dies once began
to execute what is left in his own hand stands good
This I do not see to be true any where Case is
quoted. But where there is none I should think he
ought to hold it.

Courts of Error in England. The Court
is a Court of Error to revise & Judgt of Ct below there
I have seen no Case where a Writ of Error has
been taken from the Supreme on affirming a
Judgt rendered by an inferior Ct I am inclined
there to think it is final altho a Writ of Error
may undoubtedly be taken from one of the inferior
Courts to B. R. A Writ of Error can be taken
from C. B. to B. R. and from them it can be

carried

1 Vern. 344
Cart. 380

carried to the Exchequer Chamber and from thence to Parliament A Judgt in B R upon fine-ficiew of Error could always be carried directly to Parliament or to the Exchequer Chamber and from thence to Parliament. A Stat. has given an election to go to either but if they go to Exchequer Chamber it is final

If the Exchequer Chamber affirm a Judg. the Def. brings error in B R they cannot for Deft. a Judgt given in B R for Plt and end the suit. If for the Plt by the case must go back — as for returning a Venire de novo it must now be done If it was a demurrer or any other discretionary Judg. it must go back

Now for error made of Writ of Error on to Exr. an Exit. Exit is a Writ of Error for all civil and Crl. Mar returned every one how to what he has said but in a different way If in Exit of Judgt is reversed in favour of the Plt below they suffer him to enter the case in Crl. as tho it came there by appeal. The only Judg. is that the Judgt below be reversed and he enters his case in the Pleades and the removes all the last said in the Lords on the merits. If Judgt in Exit intended he should have no Costs and the Deft has his Costs taxed. But if he has actually paid the Deft his Costs in the Exit. the Exit will give him an Exr. for them, for to them the Deft is not

entitled

entitled. The Judge is not moving the Party to what he has said. This is when the Deft gets his costs.

But Judge Adams was a Deft, and Deft moved the Judge — what is he to move? Why all that the Deft has said. But the Plff can enter nolle but he would be a fool in this case for his declaration has been refused by the Ct to be insufficient. But there may be cases where it would be well to enter. But here the Ct. in a plea in abatement over an answer over. On the trial the Deft offers a witness who was admitted The Plff filed a bill of Exceptions and reversed the Judge. Now Plff may enter and proceed with his case for the reversal does not put an end to the case

The Supr Ct have sometimes no jurisdiction of the cases until they are made so by the reversal in which case they may be entered But sometimes they have no jurisdiction over the subject matter without regard to quantity or quality — As in the case of highways a Judge on which subject has been reversed by the Supr Ct it must go back to the Ct. So in cases of complaints under the Statute of Partiality

Assignment of Errors

The writ of Error begins with stating that such a case has been tried in such a Ct and states the whole record. Then the Plff says in manner and

5 Coke 37

said Judg, the Ct mad and mistook the Law and then stated the Evid. He may state as many as he pleases By the C.L it is not safe to state more only generally. but now according to this practice it is said they will not go to the Leaving of particular evid. unless they are assigned - I take the rule of Law unincumbered by a rule of Ct to be this - that the Judg. are bound to look into the evid. and if they find any error to reverse the Judg.

1 Rolle 701
1 Salk 147
1 Ventr 252
Sylvester 58
Carth 338

Third is another rule to be noticed. viz that most in fact and more in Law can never be assigned in the same Writ. They must be in distinct Writs. The reason is not satisfactory. It is this - Matters of fact are to be tried by a Jury. and matters of Law by the Ct and therefore you cannot join them But this is often done in a Plea and to a part of the declaration and a demurrer to the rest. But the rule is as above

1 Salk 268.
2 Ld Ray 1005
Carth 338

Salkeld has even Dr Leeves in error not deny the matter of fact, but finds "in nullo est materia". This admits the fact. The Ct will now try it. It is all Law now. But if he intend to take advantage of the misjoinder of the two counts of Evid. he should have demurred for duplicity.

It is a rule that in assigning error you can never assign any thing as cause of error that

can

contradict the record. If the record is that Defr was a minor and appeared by J S his Guardian you can make no averment that J S is not his Guardian because it appears on record that he was. So any other thing that appears on the record let it be what it will cannot be contradicted by an averment.

There is another rule which appears reconcile ingenious when compared with the authorities viz "where a Judgt is an advantage to a man he can't reverse it." But a reversal is often had when Judgt was in favour of the Deft below. To be sure it must always appear on the record that some remainder of his has gone agt him and then it will not be in his favour as when he pleads nil dicit 1000£ and recovers 20 Dolls

So when there are several Contracts declared upon Cath 24
or some of which are said to be misjoined and some Cro Ja 589
not. The Ct moved upon that & the may bring a writ of Error on the Judgt on the others for the facts moved do not perhaps amount to 20 Dolls

Whatever is pleadable in abatement is not Cro Eliz 721
subject of Error if not pleaded. But if it was a suit in which no Judgt could be rendered it is error whether pleaded in abatement or not. As if a Ferre Court is sued alone and she does not plead it by way of abatement it would be error to render Judgt against her. The writ is abatable de facto the moment it is brought.

A grand. There are two Tenants in Common and one

Salk 4 one brings the suit. Now the Deft may plead an abatement but he does not and Judg good agst him
Here is no error in it

10 Co Rep 115 Sometimes a Judg is erroneous but it is under
Rolle 64 such circumstance that it is in the Pltffs favour in whose favour it is by allowing the part which is erroneous to make the Judg good. As where the Jury give more than the Pltff demands Now Judg on this Verdict would be erroneous. But the Pltff may release on the record the sum given over and above
for 6 Mod 225 what is demanded and the Judg is good. This is often done especially in Actions of Band where the Cause is continued a great time and the interest exceeds the sum demanded But in such Cases the Pltff might amend his writ or motion to the Ct

There is one thing arising out of this subject
Yelverton 45 which has not been attempted to be done in Court - that the Ct may themselves reduce a Judg contrary to the Verdict provided they do not increase it so as to make it comport with the declaration. I see no objection to it. The old authorities are this way and I have seen no modern Case agst it.

As where a Suit is brot to recover two sums of money loaned. Nihil is pleaded to both and the Jury in finding Nihil to one finds that it was Counterfeit agreed and as to the other avers it to be Counterfeit agreed The Jury being in a Verdict for Pltff that he recover both sums in the two loans

Yet

There has been no case laid upon one sum you will see. The verdict then is bad as it respects this. for the issue is intire and. Nor the Pltf may release one of the sums, and take Judg.t for the other

The gen.l issue to an writ of Error is "in nullo est erratum" and it is also the defend that can be pleaded except it is a matter of fact which you deny or must you have something which is subsequent to the Judg.t as release of all errors or suits. Cro Ja. 104

Another gen.l rule is this. That when there is a Judg.t agst. Several if it is erroneous as to one it is erroneous as to all. They say the Judg.t is entire and must be wholly good or bad. Our practice is different. An action of Assault and Battery is brot. agst A B and C. C was an Infant and did not appear by guardian. The Judg.t agst. all is clearly erroneous upon English principles it could not be reversed as agst. C and stand good agst. A & B. neither is it can be. Reasonable of proceeding there is no injury done. There is no contribution between Tresspassers. A and B cannot complain if C gets clear for they could not compel C to pay any thing. if the Pltf shants called this Ex.r out of them or one of them 1 Rolle 788

But when there are two distinct Judg.ts Conclusions of law a writ of Error in England one may be reversed and the other stand good. As in an action of Account the Judg.t is "quod computet" but in the report of the auditors there is a manifest mis- Cro Ja. 289 1 Rolle 760

5 Coke 32 A writ of Error is not to reverse these Judgts. One may be reversed and the other stand good. So in the case of an Extn. One is sued and Judgt obtained and Extn goes out agst the goods of the Testator in his hand Then a Scire Facias is sued in proceeding on which there is error. Now the Extr brings a Writ of Error to reverse these Judgts. One may be reversed and the other stand

Cro Eliz 319 One thing out of the road — There is an instance in which the Court of Exchequer extended the proceeding Judgt & reversed. But it is in a case where there are no facts to be proved. It was only a question of Law arising upon a Special verdict. I do not see that this is any infringement of principle. And in similar cases one Ct of Errors have done the same thing

One thing more. That the person making the Judgt shall be attached to all that he has taken is a principle never to be infringed upon. But how is he to be attached? A recovers of B Debt & Extn and Cattels the money by the sale of a pair of Horses at the fair. Now B brings a writ of Error and reverses the Judgt. What is B to have? Has he to the Horses? They were sold to C. Now can the Court tie the Sheriff in Prison? No. he must in such a case issue a Judgt to recover out of the Goods of the Horses. He cannot sue the Sheriff neither who sold them. He took Security before the money and he was bound to execute & suppose the

The principle above which relates to C. is for his protection, and is a principle of policy altogether.

Now suppose in England A. had taken out an Elegit and had the goods appraised off to him. Then B. revests the Judg.t while the goods are in A.s possession as his property. B. can recover the goods out of A. and according to the modern idea he would not, but has a Trespass lies to go to the Stable and take them

If a Term of years has been sold under an Ex.on and B. reverses the Judg.t the Vendee will hold it But if it was extended so that it was A.s property B. would have it on the reversal

Hence has been a great question where we have a mode in New England of appraising Land in fee under an Ex.on This is unknown to Com.n Law. Now suppose A. moves out of B and buys upon Land and has it appraised to him and then sells it. Afterwards B. reverses the Judg.t Now can C. hold the Land agt. B. A. had no title to the Land because the Judg.t was reversed, and the sale was a private one not under the sanction of the Law as by Vendue in market out by the Sheriff or by him at the post under the Ex.on But it is held determined that C. must loose the Land. and he is in no worse a situation than he would have been had he bought any other parcel of Land the title to which was defective

There is another case. an action is brought agt.

agt. the Sheriff for an escape. Before plea
pleaded the Judg. agt. the escape is reversed the
Sheriff pleads nul tiel record, and it will avoid him

Offering to Plead, and Pleadings by Consequence

Note 1st The word "plea" includes the Declaration for the Latin word "placitum" which answers to the English word "plea" is "nomen collectivum" including all the allegations made on both sides and all parts of the allegations

The pleadings which found the Declaration are made up of those allegations which the Defts making by way of defence and those which the Plt makes to fortify his declaration or Count for in each stage of the pleadings each party must plead by way of fortifying that he has said before and to destroy it by denying what the other has alledged against him

Carth 357. Salk. 219

4 Bac. Ab. 5

Note 2nd E.G. in declaring on an indented Agreement the Deft states the indebtedness which is a fact - he then states the promise arising from the indebtedness. this then is no actual promise yet it is a conclusion from the fact of indebtedness. When the promise is laid it is not alledged as matter of Law but as fact If the Deft demurs to it he confesses the fact and if it were by writing he confesses the writing - this promise is the conclusion from facts tho the promise is only fictitious and the promise is stated as a conclusion from the facts.

Note 3rd E.G. then declared the Plt brought an action on a case in which it was necessary to make a demand: now if he says that Deft has not

[illegible] formed,

performed "altho" he made a demand at such a time and place it would be practised enough. and so of the other words - "per quod" - "quia" The usual form is to state the demand and refusal at length

Note 4th General Estates in Fee simple may be generally alleged & the party in pleading is not bound to shew when or how the Estate commenced

Lawes 47 2 Ray 333 3 Wilson 72

But when any depd Estate, as Estates Tail, or Life Estate is pleaded the time and manner of its Commencement must be alleged. The reason is that Estates in Fee simple may commence by mere matter of fact, and even by wrong, as by disseizin which is a mere matter of fact But a particular Estate always commences in some manner which involves matter of Law, and the Court must judge of it, - as by Fine. Elsewere Doe Davis &c Fee simple Estates commence by matter of fact and of this the jury are the judges

Note 5th An immaterial averment is one such the non-traverser relates immediately to the point in question & that the failure in proving the averment would work a variance

An impertinent averment is a thing altogether foreign, not relating to the point in question and an omission to prove the averment would not occasion a variance Eg. of an immaterial averment. A sues B for taking all the goods of C in Land from the Land and not leaving enough to

to pay his rent and alleged it was payable quarterly – it was not payable quarterly, and it was immaterial, he need not have stated it but having stated it he was bound to prove it. The Ct held the omitting to prove it would work a variance. and as the declaration on an express Contract he must prove it as stated. tho' the Contract is mere inducement

When the averment is impertinent it need not be proved. it is foreign to the Contract. – as in the example of a man having on a red coat. – Is a criterion – when a variance is the consequence of not proving an unnecessary averment or in other words when an averment united into the description of the thing alleged. it is immaterial only not impertinent.

When failing to prove an unnecessary averment would not work a variance. or in other words when an averment does not enter into a description of the thing alleged. it is impertinent. I find in a late Edition of Douglass in a note. it is said. that the necessity of proving an immaterial is now confined to Records and written Contracts." he is unsupported by authority. – the true rule is that it is confined to Records and express Contracts. "Buller" indeed says it extends to written Contracts but he does not limit it to them. It is confined to Records and express Contracts because in no other cases can there be a variance. But

* NB both unnecessary but in one case they are stated.

But they shall not extend to express Contracts
they must be as specifically stated as
written Contracts. The is unsupported by authority
and even unprincipled - my rule is the same one
the Statute only expands on the doctrine of Variance

Note 6th It was ruled in the
Pleading that a party need not allege more than
what will amount "prima facie" to a sufficient
Cause of Action, or a sufficient ground of defence
for Instance in "prima facie" sufficient is sufficient
on the part of the Crown in Common Informations
2 Wilson 100 &c; it shews as it ought to do until the Con-
2 Burr 1037 trary is shewn. It follows from this that neither
2 Bl Rep 400 party is bound to negative all the possible answers
the other party may allege. In Assumpsit on a
Contract it is sufficient to shew that there was an
indebtedness and that it was not performed. It
might have been by a release yet he is not bound
to negative the answer until the party may make
that he was a Minor, - or it may be that it was
an usurious Contract - or founded on an illegal
Consideration - or obtained by Duress yet he is not
obliged to negative this. He is not bound to antici-
pate and negative the possible answers they may
may make to his Claim - and so thro
all stages of the Pleadings.

Note 7th So also if sued the Plaintiff for
an entire and indivisible thing he cannot recover
less than shewing that he has no title to part for

Re-

Declaration is bad and he must fail. — There are some distinctions which I will not stay now to mention as they are so plain that you can thoroughly understand them by reading them and I shall refer you to a Book where they are to be found viz — 11 Coke 45 1 Saund 285 b

Note 8th In the action of Assumpsit the word "agreed" is in pleading tantamount to the word "promised" an exception was taken in Engld to a Declaration which stated the Deft "agreed" to pay instead of promised and they contended the word promise was indispensable. But it held "agreed" was tantamount to it 2 Mod Rep 82 Salk 653 3 Mod 3 Rep 156

It is a Gen rule when from the facts stated the Law would raise a promise that the promise itself must still be expressly stated the facts creating the indebtedness and only evidence of an indebtedness and do not show a promise of indebtedness. This is the reason if I state in my declaration that A is indebted to me for £100 if it is bad I should also state that in consideration thereof he undertook and promised to pay. This is said to be an exception to this rule in actions but on Bills of Exchange agt the drawer and promissory Notes agt the maker the rule is established. Because Lord Holt the drawing of the Bill is an actual promise it is not necessary to state the promise substantively but merely the facts This was never decided in Bank, but it is laid down by Holt and in several other cases. Dawes 49 2 Ld Ray 1517 Salk 653 Carth 513 1 Burr 164 Sayer 35 5 D° 50 Salk 126 Str 224 2 Ld Ray 538 Yelv 43 2 H Bl 63 4 Mod 351 451

Now if one was permitted to reason on the point—

principles of the rule it would seem not well founded. I do not say it is not Law for it is Law yet I think it was founded on the whim of a great man I can't see the difference between this and other cases and how can an assumpsit be raised when there is no assumpsit. but the evidence of it?

Note 9th When a Declaration is demurred to for misjoinder of Counts the Plff can't enter a "Nol: pros." as to one Count and then destroy the effect of his own misjoinder for he can't by his own act thus defeat the demurrer. It seems to be a rule of practice in England that the Plff may do this before the demurrer is entered but not after. If he does it before demurrer is entered he then by entering a Nol: pros: withdraws, he does not cancel the Record and his Declaration appears good.

1 Ch Pl. 108
4th Bac. Abr. 360
1 Saund. 285 a, b

Note 10th But the word "Solicit" is not sufficient positive for an averment when it is not repugnant to what precedes. — thus if he declared the Deft promised to pay a sum of money viz £1000. It is sufficient it need not be lawyer like positive but it don't destroy the Declaration).

2 Wms 335
1 Saund. 100
2 Do 291
1 Roll 232
Do — 483
Lawes 149

Note 11th When in certain Cases Scienter in the Decl: is requisite to be alleged it need not be positively alleged it comes in under the "&c" and is in the Grammarian Stile in the Imperative absolute) so in the case of maintaining a Dog &c Scienter is of the gist of the action yet the mode of declaring is "the Deft well knowing the same" he became not insured).

10 Coke 77
Hobart 5
Do — 18
4 Coke 18
Carthew 110
1 Ld Ray 180 and 2 Salk 662
Salk 48 2 10 Mod
Str 3 15 + 457

Note 12th And indeed it is a Gen.l rule where there are two Counts one good and the other bad and the Deft demurs to the whole declaration that the Plff may have Judg.t on the good Count.

Com. Digest
Pleas C 32
C ——— 36
F ——— 25
2 ——— 3

Note 13th The rule is laid down by "Ld Coke" and followed by others. Ld Coke gives some mysterious reason for it. viz. that it is founded on Baptism. that he can have but one name. for Ld can be is baptized but once. and it is unchristian for a man to have two Christian names." — and according to him if a man executes an instrument by a wrong name (Christian) he never can be sued by his right name. I think it is wrong in principle and contrary to Municipal Law. It is ingeniously evaded by Ld Ellenborough. when one was sued as A.D. alias B.D. he said he would consider the "alias" part of his name and read the name "A alias B". I think the doctrine implied in "Stry." also in Salk may be considered as shaking the rule laid down by "Coke" and followed by others.

Note 14th In Com. Law even as the Cst may be the rule would hold for our Law requires in transitory actions that where a suit is brd it must be in the County in which the Plff or Deft lives. — so that the true ground of abod is merely as an addition to determine whether the Ct has Jurisdiction.

Note 15th I would remark that many

years ago a Demurrer in this form could not be sustained. It has since been overruled as clearly not Law. The Ct did not distinguish between a Demurrer to the Evidence and a Demurrer to the Declaration, obtained at Guildhall. A Demurrer to Evidence is upon an issue in fact.

Hindes 1067

Note 16th Not only because it is unreasonable for the Deft to be suffered to go on till a great deal of Cost has accrued before he takes advantage of what he might have attacked "in limine", but for another reason. That if a Deft could plead to a Writ of Error any thing he could have pleaded to the original action. It insidiously impeaches the former Judg. The Judg. virtually negatives all facts, which the Deft could have urged to defeat the recovery in the former suit.

Note 17th It is said in some Books that there can be but one plea. "Quid pro quo communis" is after the last Continuance. This means a plea in abatement of matter arising after the plea is out. So that the Deft must not be delayed "ad infinitum". Then can there be but one Error according to this rule. and yet I doubt it, the rule seems to be questionable. For suppose a matter of abatement which ought to defeat the Writ arises after the second Plea. it would be strange if the Deft could not plead it

Lawes 174. Gilb C.P. 205.

Note 18th If the Debt on Bond the Deft pleads "nil debet" instead of "non est factum" which is the usual

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do. and the Pltff. cant demur (as he may because it cou
-fesses the execution of the Bond) the Deft. is let into any
evidence which will go to shew that in point of fact 5 Bac. Abr. 38.
there is no indebitatus. whereas if the Pltff. had demur
-red the Plea would be overruled, for it admits the Suf-
-ficiency of the Bond, but denies the indebitatus; but if the
Pltff. saves it by omitting to demur, the Bond proves
it self no debt, and the question of indebitatus is the
only one tried. -

Note 19th When it is said a negative Argument
is cured by Verdict the meaning is that if the Plaintiff
take issue and it goes on to trial it is good. But I
take it that it is not good if aided by Verdict if found
for the party tendering the negative Argument tho it is
good if found for the opposite party and this is evident
from the following example The Deft. pleads a Re
-lease since the Date of the Writ. The Pltff. says he has
not executed a release to the Deft. since the Date of S
-herewith leaving the implication that he executed
it before. now if Verdict is found for the Pltff. that he
did not execute it since the Date of the Writ the
implication remains. If the Verdict is found for the
Deft. that it was executed since the Date of the Writ
this is a defence for the Deft. as good as if executed before
and he may have Judg. - Accord on the demurrer Judg
Pl. Stat. 8 Anne. according to many opinions has mi
-sered this a mere matter of form and is done away by
the said Statute tho' some Cases do not allow

Comb Dict 16
Hard 20
Salk 107, 8
Holt 321

Nov 20th Ld Holt said in Comyns and Lindal, that a Special Verdict must have all the Circumstances done it would be a negative Judgment — That the Court will not Guess nor Intend any thing to make out an Indictment. Fry both Cases Holt 321. — in the Case of Burbridge he said it was a negative Judgment and in both it was — but he would not Intend their Guilt — The rule is by no means a universal one. Where Circumstances are found the Court and when it is found not to be a positive Judgment of Law was an Indictment. The Jury find all the Wounds and the Prisoner is not bound to Intend an Indictment because the Jury might possibly be a negative Judgment — he must ascertain whether without an Indictment it would be a negative Judgment. Eg. The Case in 1 Ld Raym. Battow pleads matter in Bar as if he was an Alien and pleads the Peace but must find and without an Indictment if the Jury should find a negative Judgment. he will direct them not to give his hand upon Issue — leaving the Conclusion that he did not lay his hand on him should. he must have the Indictment that it may appear to be a Battery on record. you may bail your hands and find the Circumstances and the Jury if he Conclude as with an Aliquod hoc — So in an Action on Contract Debt is founded by Deed — if he says he has not — If it is found against him to pay £10 for Rent thus leaving the Circumstance that it was agreed to take £20 but by adding the Circumstance that it was for Cattle and

interest, abeyance) he excludes such an application

But there are many cases where a Plea and Issue amount to a negative pregnant tho' no inducement is added. - as Deft pleads his Co. Deft is dead. the Deft replies he is not dead but he is named of an "abeyance &c" that he is dead" - and many more cases might be given

The rule of Comyns and Lawes, held in general only when the Traverse itself includes circumstances and particulars which are not material in such case the inducement is sufficient to distinct and explain the nature of the Traverse, & in these cases &c — 2 Saund 188 g
1 Saund 103
Wms 381
2 Dyer 280
2 D° — 312

Note 21st I find a case case determined in Massachusetts that Defts cant join in actions sounding in Contract and only in actions sounding in Tort. The reason of this rule is that if two or more Defts are sued on Contract when both did not make the Contract they are safe in pleading for if the Contract is not found agst both it cant be found agst either. 6 Mass. Rep. Reports 444

Now this rule will do if they both agree in the same Plea. but if they can't agree in the same Plea & think the Law would not compel them to plead together; one or other must accordingly to the rule be compelled to join in the other defence and so could not such be the Case with this would it not be right to compel the Deft to join in a defence which he thinks futile. The Case in Massachusetts was where both joined and then the rule was found. but it certainly would not be so if they did not choose to join.

Note 22d. And it has lately been determined by the Ct of Exors in Conn. that the Defts oath is not admissible to prove the fact of Coll. Fund was an English Case cited "Coulia" in 2 Str. 1100. It is not to the point he made an affidavit as to a point of practice. it was nothing more than a common Case of the party's oath in a question of practice. (as for the Continuance &c) - It was not the oath of the party on an issue joined to the Jury. It was decided in N Carolina that the party's testimony in this cause could be admitted & must be read on a motion & had the same effect. The fact of Coll goes into the issue and is to be determined to entitle the party to recover. The Ct may admit the deposition read but it is not conclusive to the Jury that it is truth. It is left open for the Jury to decide together with the issue. The point was decided in the same Case

Coleman vs Woodcock 1816

Note 23d. So also a Deft is bound by a former judgt in Chief agst him tho' he failed on a demurrer a plea in bar on the gen. issue. Payment is the same as to a former judgt for Deft concluding him in the second. It is sufficient whatever the form of the issue was what the right was decided. Suit must have an end to litigation.

Exo Eliz 308. 5 Coke 7a

But in England a judgt agst the Deft on a Real action is no bar to a writ of entry sur disclaim to try the right to the same subject for

in the Action of Ejectment) & not Similar and
Common, nor if the right claimed the Same &
of the Same Subject (as claims the Same Land) 8 Coke 7
but a different right in Land. and in England there
is a gradation of Real Actions. Same Reason and
Same Cause why Land is adjudged to the Heir at L.
one right and another to another &c.

Therefore at a Tryal in Comp. where Case
in one action that Land is called a Real action
and that of Possession and that is more Anciently
annexed actions for Realty and Personalty are both
annexed. In N York and Massachusetts they
have a gradation and a Mean right and thus the
rule holds.

Note 24th And it has been lately determined in England and Comn. that a Recovery
agst. A in an action of Land, on his having falsly 3 Co. Litt. 208
by recommended B as worthy of Credit is no Barr to 1 Dan 22
an action agst. B. on the Contract made upon
that recommendation. The action agst. (B)
is not for the same Cause, the amount due
on the Contract is not necessarily the Same
of damages in the action agst. A. on the fraud

(The first action was Founded on malefic-
ent in Contract, and the damages recovered were
not as payment for the Goods but as a punishment
on Deft. for his want of good faith and integrity. Nile)

Note 25th And this is the reason why on
the Engrossment of pleadings, Impotent pleas - Plaint
pleas

Pleas. the said Defendant wilfully, fraudulently, fraudulently, and
sham Pleas contrived & determining, and thus taking
an advantage of the insufficiency of the declaration, the
Plaintiff was compelled to an Amendment. This sham
Pleas was indeed the other to demur and then
the said Defendant would take advantage of the
default in the Pleas of the other party. !!!

B.40

3144

3146

83.4.5

Evidence

3148

Evidence

Evidence is that which demonstrates makes clear or ascertains the truth of any fact or point in issue either on the one side or on the other 3 Bl. Com. 367.

The Spirit is to furnish the mind of the Jurors with demonstration or conviction of the truth of facts disputed by the parties and put in issue More Concisely. Evidence is any thing introduced into Court to ascertain the Issue For the purpose of ascertaining facts. 2 Wils. p. 253

Evidence is of two kinds, viz

Written. — and Unwritten.

But before this is proceeded with some general rules applicable to every species of Evidence will be laid down

1st The Cardinal rule is that the best Evidence the nature of the Case will admit of must be produced. Reason is that a reasonable suspicion is excited that the best evidence is designedly suppressed — Thus in Contracts executed and in the custody of the party Cannot be proved by Parol. a subscribing Witness if within Reach of Process must be called. Thus a deed cannot be proved unless the best evidence which exists in the Case and not the least which might have existed must be produced. Thus 1 Salk. 86

Thus a Contract which is fraud and not within the Stat of Frauds and Perjuries may be proved by fraud and shall have been in writing But because the rule requires the best evidence the nature of the Case admits of: this Court requires all the nature of the Case admits of always Thus one Subscribing Witness is thought also one Witness to a Commercial Contract for it exceeds no reasonable and prudent Man that the best evidence is not produced or Satisfied The rule then is that what the Evidence must be the best of its kind and sufficient to answer the purpose of the Party

Peake 4. 2nd Another Gen rule is that he who
B.N.P. 298 takes the affirmative of an proposition must prove it. A negative proposition is not in its nature capable of proof

Peake 5th Norman is charged to have sold a sick ox
Gilbert 148 to be sound unless some one proved it sound to shew it to be sound Thus it is an exception to this rule. When a man is
B.N.P. 298 charged with not having done an act
3 East 192 which in Law he was bound to do

The reason of the rule is the Law presumes every man will do his duty unless the Contrary is proved And the Court

will

will never Caution you to forget that the
Law presumes you innocent, unless it is proved.

3rd The Character of either party may not
be questioned unless put in issue by the pro- Peake 5
ceedings (And the Character is put in issue
and Evidence proved when it had it would be
stay or determine the damages: or Verdict
good, it would be executed)

Trover in an action by A against B & B 3 B & P 290
tells agt. B is not permitted to prove that
B is a Captain of Militia. But when Character
is put in issue you may prove what it is

Thus in "Crim Con" you may prove the
Wife's Character previous to the time of the adultery
injury Committed (But the Character of
the Husband cannot be proved)

In Bond is given by memorial "judicia" the
Deft must prove particular instances of kind- Peake 5
ness. There is an exception to this when a man
is indicted for Rape

In Criminal Cases the prisoner may shew
his previous good Character - but the Public Cast 1 Bar & Pul 352
then a previous bad one may be called to rebut
Evidence that he had a good one

24th Evidence must be confined to the Peake 5
issue i.e. to the particular fact in dispute 2 Atk. 184
because the Case in question should never 1 Ves 154
be prejudiced by anything else to the malice 2 Ke. Rep 283

5th

5th Hearsay Evidence is not admissible, i.e. one man cannot come into Court & swear to what he heard another man say, or in other words, a man must swear to facts within his own knowledge. Five are the reasons for this rule. 1st The Law always requires the sanction of an Oath. 2nd The Law requires the benefit of examination and Cross examination. To this rule there are exceptions. A party may show what a Witness has said out of Court tho' this is not to prove any fact except that the Witness is not to be relied on. Again it may be introduced to Corroborate the testimony of a Witness when his testimony is alleged to be impeached. So those things which can only depend on hearsay or reputation may be proved by persons not in Court e.g. Pedigree, Prescription or Local Customs — Thus Matthew A is dead & then about a dead a great while. — Who is a married man — has many Children — he had Inscriptions on a Grave Stone. Family Bible. Memorandum books. Whether A and Bigamy married. Whether C was born before or after marriage &c. — But not to prove illegitimacy, for want of access — nor to prove a right of way, nor the Custom of Land.* So too that a fact has said against interest is admissible evidence but all he said must be proved or pleaded and not a part & then is what is said in his favour is not denying it. So too that a man says

Rex v. Hinton 1 Leach 1723

Cowen 5th Peake 92 Rose 2 264 Rose 3 on 22 — 53 422 — 514 2 — 509 Vol 1. Page 273.

* Such reasons might be admitted on Pedigree Vide 663 Posting 1094 but it must mean admission of fact not Law 6 T.R. 480

in "articulo mortis" when the Comedian himself dying
declared the Said Comedian had made as great
a Obligation to tell the truth as when under oath
But what a mean Confession of a retailing a talk
in is no evidence agt the third person.

But the Wifes admission is no evidence agt the
Husband unless it is proved by him in the Ca-
pacity of Agent in the management of his busi-
ness which is the Case of a Factor. the reason
Founded in Policy is because the non-admission
of it tends to further the public Safety and
Happiness. If however the Wife not employed
make a Contract and the Husband afterwards
Satisfies it the declaration are evidence to charge
the Husband So what the Wife has said may be
given in evidence when the Husband and Wife
sue in her right and this not on the ground
that she was an agent. But the Value on the
ground of the Contract is not this the declara-
tion of the Wife then is agt Husband in Law
and not his. "Quere as to the admission & de-
claration of a Factor in facts made by the agent
or Servant to bind the Principal or Principal"
the Qu. seems to be that it may be admitted.

"But an Offer either by an Agent or the party
himself to Compromise after a difficult that
arises is not an admission within the Rule
Both as to the party making such Offer
entitled to buy his peace" On the ground that
the declarations of a party are Competible of
fact

3 Burr 1244
2 Bl Rep 997
Leach 3, 78
4 D° ___ 563

3 Peake 154
7 D° 006
et infra

2 Stra 1094
1 Ld Raym 396
Peake 17

6 Peake 60

Ess Digest
Evidence 142
3 Peake 438
D° ___ 038

2 Bl Rep 1230

1 Hawk. 53
3 Stud. 259
1 Law Mag. 378

Leach 299.

follows that the Confession of a Criminal was
regularly made is evidence against him. But it
is thereby when it is obtained by promises or
threats, but even then if in Consequence of
such Confession Stolen Goods be found as to
that part is admissible (i.e. to shew the Goods
are, but not the Confession that he stole them)

Privileged or Incompetent Evidence

and under this head what persons may give Evidence.

1st Of persons incompetent by reason of want
of Discretion or imbecility of Understanding.

3 Bls. R. 293
Leach 1122

All persons who are Witnesses must be possessed of
such an understanding as that they can retain
in their memory the events of which they have
been Witnessed. For want of this understanding

Co. Litt. 247 b.

Idiots and Lunatics are excluded while under the
influence of this malady. So also are Children
who are not of an age to give that they are
impressed with a sense of the Obligation
of an Oath. But in a Gaol Case that a Child of

Leach 237
Do — 434
3 Bls. R. 293

14 may be a Witness if he is thereupon supposed to have
sufficient Capacity. Under that age it is a question
how to be decided by the Court whether it is of sufficient
understanding to understand facts and
to know the Obligation of an Oath. Before

Gilb. Ev. 147.
Peake 300
1 East. 1
Cro. Ja. 444.

that time a Child of 9 might but some Children
have never been admitted under 9 years
of age. But it has been the practice in England
and Canada to admit Children who are too young

No

to swear to the whole truth without any oath. ——

Deaf and Dumb persons if of sense to have an Interpreter convey to them may be examined thro the medium of an Interpreter. Quere must he be sworn?

Infamy. Some persons incapable of the infamy of their character even upon Indictment &c. others less creditable than mankind in general. The Credibility of a witness is left to the Jury under all the circumstances of the Case. There is a confusion often kindled in the minds of Students between Competent and Credible. The distinction in point of Witness is Peake 124 4 Bac. 417
a mere matter of Competency. it is always done by the Court and before he can give in Evidence. But his Credibility is a question of fact to be determined by the Jury according to the appearing or corroborating circumstances of the Case. This is always the meaning in the Statutes

1st Of that Infamy which detracts from the Credibility of a witness, this depends upon the Gen. character of the witness to be determined by general testimony.

To Challenge to destroy the weight in testimony in this manner the things are many Peake 125
For this Gen. character as proved on Cross Exam. 2 Bac. 290
report must be between Man 2nd The Wit- 4 State Trials
ness must swear that from his knowledge 69 2.
of such his Gen. character he would not believe him on his oath.

In

In Court the practice is only to enquire into the general character. Of how much have good faith into other enquiries. This evidence is admissible only as applied to the Gen.l character of the Witness, particular acts of misconduct are not to be enquired into for the party is not supposed to be always prepared to answer to any charge which may be suddenly made in pointing in a Ct of Justice. The party whose interest it is to shake the Witness may call upon the other Witness agt him to declare the ground upon which this opinion of his is founded. This is a good way to sift the truth. for men may form very improper ideas with respect to what constitutes the of character by which they would believe him on Oath.

Peake 288 Bl 4to 290 The credibility of a Witness may then be weakened or destroyed by shewing his Gen.l character to be bad. It may also be weakened or destroyed by introducing proof of his having related the facts differently out of Ct from what he relates them upon Oath. Thus the Confession of a subscribing Witness on his death Bed, that the Will he attested was a forgery is admissible to subvert his hand writing. This privilege of attacking a Witness by general evidence is confined to the party against whom the Witness is called for the other can not in this way impeach his own

own Witness. The reason is that it is good policy to permit a person to introduce a Witness merely to shew the general character of another to be bad But if the Witness testify no fact which can against the party calling him he may disprove those facts to which he has testified by introducing others who will speak him incidentally. 1 Bull N.P. 290 2 Esp. Rep.

2nd Of that Infamy which renders a Witness incompetent. To make a Witness legally incompetent on the ground of Infamy he must have been guilty of the "Crimen falsi" - by which is meant any crime which goes directly to attack the character of a man for integrity. i.e. any crime which can bear the stamp of fraud - as Forgery, Perjury, Theft Conspiracy, Bawdry, Attaint &c false &c &c "Quere" - as to Treason. Peake 127.

To constitute the "Crimen falsi" - the modern rule is to regard the Offence only and not the punishment as formerly 1 2 Wilson 18. Salk 689 (2 D° - 690

To render a person incompetent he must have been convicted which is to be shewn only by producing the record because it is the best evidence the nature of the Case admits of. You never can introduce Witness to prove he was convicted. But you may ask the Witness whether he has not been 1 Wilson 282 Co Litt 6 1 Salk 689 3 Levinz 425 Peak 136-40 2 Ld Ray 1008

1 Hig. 406 4 T.R. 440 Caster 3 1 Sid. 84

been convicted and suffered Judg[t] of Law because altho it criminates him it can't put him in danger. Thus then comes the best evidence, and of course supplies the necessity of the record.

Dis incompetency may be removed

1 Salk. 389 2 Raym. 433 D° — 452

sometimes by a Pardon, and sometimes by a reversal of the Judg[t]. Wherever the incompetency is a part of the punishment the infamy can be removed only by a reversal or an action of Perjury on the Stat.

Leach 115 Tho. Ray 380 1 Rust 349

But where it is not part of the punishment a Pardon restores the Competency. The pardon under the Kings Seal must be shewn. The Law of Pardons is not well found'd. a pardon dont go on the ground that the Judg[t] was incorrect. it is a mere act of mercy, and all the infamy still remains. How a pardon can apply see Judge Reeve says he dont know and there has been one made admitted here who had been convicted of the crimen falsi and suffered punishment, but it was on the ground that the presumption that he would not speak the truth was rebutted by a long & exact life. He conceives how a Pardon dont render competent. It was not in Massachusetts or in New Hampshire. A person who has been guilty of a Clergyable Offence and allowed the

Salk 288 9

Com. Digest A — 2

benefit

but it becomes competent. this is a Stat. pardon

One who is a "Pardus & Criminis." is a compe- 2 Hawk 432
tent witness for the Deft or Plaintiff in every Case
tho' part of the Declaration or Indictment for Peake 136. 46
the express purpose of being called as a witness Gilbert 139
If he has been made a Defft he may at Hardy 163
any time be made a Witness by entering a "Nolle Bull 280
le Prosequi" as to him. It only goes to his Credit, Leach 134

3d Atheism. At Com Law persons Co. Litt 6
of Atheistical principles were always excluded because they D° 760. 1
don't feel the sanction of an oath. Formerly Hale 434
all Infidels were excluded. i.e those who did Gilbert 145
not live in a Christian Country. — as Pagans Peake 141
Mahometans &c Now they are always admit- Pltk 21-42
ted if they swear by what they believe and the 1 Wilson 84
form of their oath is always to be observed 2 Stg. 1104
Leach 64

To the enquiry then who are excluded under Atheistical D° — 432
ideas - the answer is all those who don't believe in the 2 Salk 4
Divine omnipotency. Omniscience & one God. All Leach 459
who believe such an eternal Being." Gilbert thinks Carthew 389
excommunicated persons are excluded in Eng. Pas. 23
and because they have been given over to Black 1 Ca. Ab. 285
rebuke by the Ecclesiastical Ct.!!! This is denied in Gilbert 140
Peake. In the United States excommunica- 2 Burr 1117
ted persons are admitted Quakers are admit- * See a case in Cro. Car. 4 Dan. —
ted in England in Civil Cases under their affir- Peake 140
mation and under the pains and penalties of 2 Burr 1117
Perjury - but they are not in Criminal prosecutions 2 Stra. 1219
Carthew 382
2 Stg. 854.
D° 872. 940

In

In the United States they can testify in all cases criminal as well as civil. They may in England in Quo Warr. prosecutions the affirmation of a Quaker may be read in England in a criminal prosecution to exculpate himself.

Peake 143

4th Interest. With regard to persons incompetent by reason of their interest in the cause, the gen. rule is that all persons interested in the event of the suit are excluded. This interest in the event is either Direct or Consequential. Direct when he is to be immediately injured or benefitted. Consequential when tho' the judg. obtained in the cause to which he is called to testify may be used as evidence in another cause, to which he is a party. This is the only interest which excludes at least in Civil Cases.

2 Ex. Ray 1008

15 Prof. 306
2 Do. 103
3 Do. 27

35 Prof. 308

35 Prof. 27
Bentham's remarks
An interest in the question no exclusion in Civil cases ——
Peake 143
2 Ralle 685
Esp. 707
Salk. 284
Leach 154
Do. — 167

An interest in the Question at the Bar was and stands does not exclude in Civil Cases. An interest in the Question is one whereby he may be liable to an action in a certain event or thereby stands in immediate relation with the party for or against whom he is called to testify. The decision in that case might influence the minds of the Jurors. This is an interest in the question and only goes to his credibility. The same rules apply to Criminal Cases generally.

2 Hawk. Pleas of the Crown 63

The rule is now settled that the question in

in a Criminal Prosecution or Joynal action being the same with that in a Civil Case in which the interest gave to the Credit an interest in the question does not exclude unless the Judg in the prosecution in which he is a Witness can be given in evidence in a Cause wherein he is interested. From this it appears that in Criminal as well as Civil Cases an interest in the event excludes. But we are told that there are three cases in which an interest in the Question may be excluded viz Usury, Perjury, and Forgery — Judg Reed thinks in all three Cases the Witness had an interest in the event In Usury and Forgery the reason appears from some observations of the Chancellor on conviction the Instrument was destroyed. And in Perjury because the witness who convicted a man of this may by Law entitled to £10 As the Law stands the party interested is a Competent Witness in Cases of Perjury and Usury if he has an interest in the event

But in the Case of Forgery by a long adherence to former decisions he is not admissible. "la Rep Scutpla est" So far as to the nature of the interest which excludes.

Next to the Character of Witnesses who are interested. It is a Gen Rule that the party is not a Witness because he is in the highest degree interested. He is not excluded on the ground that he is a party for if a party on record is not at all interested his point

4 Burr 2257
7 T Rep 60 n 160
Peake 146 n.
Hard 337
1 Salk 283
1 Vent 346
1 Stug 595
2 D° 1226
6 D° — 1164
1 Sidn 431
Pks N P 12
2 T Rep 490
2 Stug 1043
2 Stug 1226
2 Ray 390
6 Mod 301
Stug 652

1 Salk 283

4 Burr 2257
7 T Rep 60
3 T Rep 308

Peake 148
Salk 10
D° — 285
Pks N P 289
2 Stug 728
723-29-57
D° 350. 374
Peake 149
1 Esp Dig 106
Burr 2257
1 Vent 101

Peake 143
Do - 149
3 East. 7
Stg.d 500
Do - 1026

Esp.c 709
1 Selw 441
Bls.C.W 285
Phil.s 153
1 Ventr 257
Hob.Cas.s 92
1 Rowe 70
2 Rowe 231
2 Shawn 47
Do - 109
1 Skinn 174
1 Selw 192
45 Geo 3 220
5 Do - 147
6 Do - 167
3 East 559
2 Selw 553
Doug. 360
1 Wilson 332
Peake 150
3 Mad. 114
10 Do 193
2 Peake 680
Mad.s 331
Bls.C.W 197
Do 289
Peake 158

1 Stg.d 500
Peake 154-64
Bulst.W 289
Do - 129
2 Stg.d 147
Selw 286
3 Wilson 40
2 Bl.Rk 896

In Rex v Winton 5 T.R. 422

fact of fact he is admissible tho' a party is a trustee only and is liable for costs in the first instance, he is excluded for the sake of indemnity against a certain liability.

If a material Witness in point of fact for the Deft is made Deft by mistake the Ct will order his name to be struck out even after the issue is joined Corporations are in many cases Witnesses when they have no private interest, and sometimes even when they have -

But to this rule that interested witnesses are excluded there are some exceptions from the absolute impossibility of procuring other evidence Thus in an action on the Stat. of Winton the party robbed is a witness as to the fact of the robbery and also to the amount of the sums if he can prove no other evidence (on this ground Lord Kenyon thinks a Guest ought to be admitted tho' M.r Gould thinks differently) From this case we deduce the principle that in all cases where a stat. is made giving a right to recover of any man or body of men upon the happening of a particular event if from the nature of the thing that event cannot be proved unless the party himself is examined he may be examined and is competent to testify

On a principle of necessity it is that a person who becomes interested in the common course of business and who alone can have any possible knowledge of the fact may be called as a witness &c -

to prove it. Thus a Servant or Agent who pays mon- Cath 180
ey or delivers Goods But he who sues for a Jew- Wills 422
elle (as a Common Informer) is not a Witness. It 1 Stg. 315
would be too great an infringement of principle 1 Esp. Ca. 95
Yet Ld Hardwicke has ruled that when the Witness Coltman Gilbert 132
has no absolute right to the Penalty vested by Com- Quart. 353
mencing the action he is admissible B. & P. 2 18.

In Com. Pl. Ms have ruled that in an Ac- 1 Rock 209
tion on the Stat. for Theft the party from whom
the things were stolen may swear that they were
stolen (tho' an Stat. gives third fold damages)

So also in Suit of Assault & Battery it is proved by
the party that the Deft commenced the Aff.

So in Book Debt the parties swear

So in Chy. the Pff. who states in his Bill that
he has no other proof may call upon the Deft to
unload upon his Conscience. Sometimes a Person Peake 152
is made Deft for the purpose of excluding his testi- Gilbert 134
mony — in such Cases the rule is if no evidence 2 Esp. Ca 552
whatever is adduced agt him he is entitled to an 1 Stg. 443
acquittal immediately upon the Pffs closing Do. 933
his Case and is then allowed to be examined 2 Bac. 287

But if there is any evidence even the
slightest to charge one Deft he cannot be
a Witness for other Defts and the question as to
his liability must wait the final event of
the Verdict for it is the province of the Jury
to judge of Credibility. In this Case how- 2 Bac 287
ever the other Defendants may insist that Gilbert 134
Peake 153

he

2 Esp. Ca 25. be tried first. and then if he is acquitted he may testify

So if one Defendant suffers Judgment to go against him by Default he is a Competent Witness for the other Defendants. — Thus in Assault and Battery.

So in Account the Pff is a Witness before Arbitrators So where awards are effected for apprehending a Felon. he who apprehends is a Witness on the ground of necessity

Quack 355 Peake 152 — note —

So in the case of Joint seasors. one or any number of them may be left out of the Declaration, for the purpose of taking advantage of their Testimony. It has been made a question whether Convicts in Crimes can testify. but this is now admitted — it goes however to the Credibility of the Witness It has been a mooted opinion that such a Witness cant be prosecuted this is so in effect. but this is no reason for the public.

2 Hawk 482

Peake 154. 1 Ves. 357 Gilbert 129 6 Mod 307 2 East 458 4 Bac Ab 480 7 Co. 481

A Witness also who is interested in the event of a suit is admissible when his interest is balanced or counteracted by an equal or stronger interest that it should be denied otherwise. On this ground the inhabitant of a County is a competent Witness on an indictment for not repairing a bridge in that County. The Proprietor of a Ferry or Exchange is a good Witness in an action agt. the Deacon to have

prove he had no effects to do away the necessity of notice. The reason of excluding interested witnesses is because they having a strong bias on their minds ought not to be put in a situation where their interest may induce them to depart from truth. Therefore "cessante ratione cessat et ipsa lex". On this ground it is that a mere trustee who has not a beneficial interest and is not a party on record is a competent witness as a Grantee, Devisee, Executor, &c, but if a party on record is liable for Costs he is excluded. It has been questioned whether a person having an accruing interest arising from a controversy can be a witness. — Thus A and B have a controversy about Land. A tells C if he recover he shall have half. Is C a competent witness? The rule is if the witness says upon his "Voidire" that he believes A will abide by his promise he is incompetent. If it can be inferred he has an interest in the event, even though it is not a legal claim yet if he believe that the other party will abide by his honorary engagements it is sufficient to eject him. For it is a well settled rule that a Witness himself who is under an honorary

Peake 150
Gilb 123
Doug. 139
1 Bl Rep 355
2 Burr 1025
1 T. R. 506
1 T. R. 290

Comp 621
D. 621
1 Mod. 21

1 Mod 21

1 Hawk 358
4 Burr 2256

Evidence

Peake 15,
1 Stu 129
Camp[bell]s N.P.
Reports 144+

engagements to make good a loss if it be not prevented by the events & the suit be thereby not legally bound is still incompetent. The interest to exclude must exist at the time the witness is to be examined, — or be known when first admitted by the situation & case or the acts of the party who requires his testimony: for if admitted the witness becomes interested by his own acts without the intervention or consent of the party by whom he is called. — such subsequent interest will not render him incompetent: the reason is because it would be in the power of the adverse party and witness to deprive the other of his testimony, and defeat the ends of justice that interest must continue to the time of the trial. and of course if the party interested is cleared. ~~[illegible]~~ his interest is destroyed: his competency is restored.

Com Dig 289
Hard[s] 134
Peake 154-8
1 Dr. Case 5
Bent vs Bellew
3 T.R. 27+
1 Stu 406+

Peake 158
3 T.R. 27
Doug 6 139
Faulkland
Plaintiff on
Goodtitle d[em]
Wilson Doug. 134+

and if the witness should refuse to accept of a release a tender of a release answers all the purposes of one. This rule that a release will discharge an interest has given rise to a very interesting questions. which has undergone more discussion than any other question in the English Courts. The question. if the witness a Devisee. who is a witness to a will can prove it upon releasing his interest? —— without a release he clearly cannot. ——

This question was first decided by Chief Justice Eyre that he could not. The decision gave great alarm and the Statute 26th of George 2nd was enacted

"That it was an exception to the rule that all interests may be released, as where a man conveys Land with warranty, which runs with the Land. But a mere sale without warranty doesn't prevent a release from operating to discharge the interest both in Law and Equity. This Rule was established ... when no action lay against the Vendor but — the action of Assumpsit now lies against the Vendor to recover the Consideration money for the consideration has failed. Where persons are jointly liable on several Contracts, and one is sued a release discharges the interest. ———

There are some insulated cases in which persons interested are admissible, probably on the ground of necessity. As where A escapes by the consent of the Sheriff he is a competent witness in an action against the Sheriff. So in case of a rescue the servant cannot sue him.

2 Str. 1253

Peake 154
1 Burr. 417
Powell &c
Gay Cases.
2 Rom. 685

1 Ling. 445

For other cases of interested witnesses
1 HBlk. 303
5 Burr. 2727
Peake Cases 174
15 Rep. 163
1 Str. 505
2 do 1020

Peake Ev. 1
page 124
Bull N.P. 287
3 Salk. 290
2 Ling. 647
Talbot 24
Do 311

a rescue is found if the fugitive touch part of the body and upon them

Lecture 14

Persons incompetent by reason of their relations to the Parties. There are very few rules under this head. Relation creates a bias, but a bias

Evidence

never excludes. As a general Rule a Party cannot testify: consequently an Husband and Wife (as to the interest the Law has united,) cannot testify for or against each other: but this is not the reason. —

Bul. N. Pri. 286
Peake 178

The true reason (founded in policy) is to preserve domestic tranquility. for the Wife cannot be admitted even though the Parties agree to it.

2 Ser 1096

So if two persons are jointly indicted for Assault and Battery: the Wife of one cannot give evidence for the other. To this Rule there are some exceptions. as in case of Treason. as it is said by all Elementary Writers, because allegiance which is due to the Crown. is paramount to all other obligations. In a Public prosecution for personal Injuries done to the Wife. she is a witness from the necessity of the case. to each may discover the fraud against the other: this is from necessity. But wife to be excluded must be "de jure" a wife: if only "de facto" she is admitted. So if she is divorced "a vinculo matrimonii" she is not competent to prove facts which happened during Coverture. * In an action instituted by a Woman as "feme sole" the Husband was not competent to prove that she was his wife.

Peake 173
1 Brownlow — 47
2 Hale 403
1 Hawk. C 301
* The innocent Husband or an authority to Publish can sue (at suit) to support the rule —
1 Ld Ray 205-9
Peake 173
Hutt — 114
T. Raym. — 1
1 Keg. 633
Bul N.P. 287 +
1 Vent. — 144

1 Case 253
Peake 174
43 Geo 3rd
Gilb. Hale
2 T. Rep 208
11 " 478
1 Term 304
3 T. Rep 431

* 2 B. & Ke. 29 in which the Court refused to receive the testimony of the Wife against her Husband upon the ground that the Husband ought not to be compelled to betray a Confidence reposed in him.

4th The next Relation is that of Council. An Advocate or Counsellor at Law is not permitted to relate or testify, even if he writes it, facts which are disclosed to him by his Client during the pendency of the cause or in contemplation of it: and the reason is that all the facts must be disclosed to the Council to have the cause managed properly, and the could not, if they might be compelled: but when they are not related in "professional confidence" the Counsellors are competent. So when in a Cause an Attorney interrogates a Witness and he answers, and in another Cause answers differently, the adverse party may call the Attorney to discredit the Witness by proving the former relation. This Rule extends not to statements to a Legal Practitioner and for the purpose of enabling him to conduct a Cause. Those same Statements to a Physician Priest or private friend are admissible. —

Under this head we may consider a new Rule of Evidence introduced by Lord Mansfield and now denied to be Law. Viz. That a Person who had given currency to an instrument by putting his name to it should be estopped from invalidating it: the reason is that two.

Peake 197
Peake 178-9
4 T Rep. 431
D° 473
Peake Ca 47-108
Cowper 845
Bulls N.P. 284
4 T Rep 753

Peake 179
D° 180
11 St Trials 283

2 M & S 77
Peake 180.
11 St Tri 243

15 T Rep 296
Peake 180
D° 224

Parties

persons might thus by writing deceive and im-
pose on Mankind. Ans first this extended to all
instruments. But afterwards it was restrained
to negotiable instruments. (But the Rule is
not now true as applied to any instruments.
Persons may be disposed by them even as from
giving testimony; - thus Parents are not permit-
ted to say they had no connection to prove their
children illegitimate, but they are competent
to prove that the time of their birth was before
the Marriage or that there was no Marriage
in fact or Law. Thus much of unwritten Evidence.

" Having thus considered the incompetency of
witnesses offered we now proceed to cases in which
Parol Testimony is rejected not because that
sort is incompetent but because the matter in
dispute is not capable of such proof.

" Thus is one class of cases in which Parol Testi-
mony is rejected - which is where a contract is re-
duced to writing, where there was no necessity for
it. (if it) it would have been good by Parol: but
as it is in writing, Parol proof of its contents is
not admissible. Thus A agrees to build B a
Ship: it may be by Parol: but they reduce it
to writing. Now Parol proof of that agreement

is

3 T.Rep. 27
7 Ves. 481

Peake 224

Hard 95 - 79
Peake 182-3
Cowp 594-4
+ Burr Sett Cases
508 + 25
Burr N.P. 112
Wms Ex. 32
6 T. Rep 330

not admissible on two grounds. 1st Because it is not the best evidence the nature of the case admits of. 2d As there is a written Contract there must have been a parol one. but a parol one is presumed as the written one is lost. the presumption is violent here that what is in the written that was in the parol agreement. has been abandoned. Consequently parol ought not to be admitted. This Rule however does not hold where the writing is lost. it must be in existence. If lost parol proof of the contents of the writing is admissible. but of nothing else. Not of what was agreed to be in writing (i e) of the parol agreement which preceded the written one. So also the Rule does not apply where the writing is in the hands of the opposite party, and he will not produce it. It must be in the possession of the party who claims advantage of it.
In this last case you may not only prove the contents. but the better opinion is. you may prove what was agreed to be in writing. (i e) the parol Contract preceding the written one. on the ground that if precisely like the written one. the defendant would produce it. — The Rule then with all qualities is this. If a Contract not required to be in writing, is written existing and in

page 412

in the hands of the party, parol proof of its contents is not admissible. In Equity, if a parol Contract is reduced to writing and by a mistake it is different from what was intended, parol testimony that it was a mistake is admissible as Equity was no remedy. Another class where parol proof is not admissible consists of those cases on Contracts which are required by Law to be in writing under the Statute of Frauds and Perjuries. All Contracts that are required to be in writing are done by Statute except one which is required to be in writing by the Common Law. Thus an Indenture of an Apprentice. This is not impeached by, founded on the Statute yet was true if the Contract is lost or in the hands of the other party, you may prove its contents by parol. In both classes of Cases the Plaintiff need not aver them to be in writing. The Declaration is not demurrable on this account. This is matter of defence. The reason is. before this Statute was made Declarations were drawn by persons who knew nothing of Law, and after the Statute they were drawn in the same manner. But sometimes the Law requires Contracts not only to be in writing, but in a

particular form of written Contracts. Thus a Deed must be under Hand and Seal, and if it is not attended with those formalities it is as objectionable as a Parol Contract. Yet even here if the Contract is in writing to convey Land — though it will not give a title in Law, it will operate to compel a conveyance of a title in Equity. — Another class of Cases where Parol proof is excluded is when it is offered to explain a written Contract. The general Rule being that Parol evidence is not admissible to explain a written Contract (i.e.) to enlarge, to diminish, or contradict it. The rule applies only to the Substantive parts of a Contract not to the appendages. These appendages are signing, Sealing, Delivery and Consideration. — Peake 112

To the rule there are exceptions. for if there be ambiguities they may be explained by Parol evidence. — There is a distinction with regard to ambiguities between a Patent and Latent one.

The former is one where the ambiguity arises from an inspection of the instrument itself. — The latter is one where on the face of the instrument it is right and clear, but the ambiguity arises from something "dehors" the instrument

instrument. The rule in such cases is if the and is
2 Bls. Rep 124 8 T. Rep. 379 quite a latent one it may be explained by parol proof. if a patent one it can not, Parol proof must not however give an instrument a different effect or explain it away Parol proof may be resorted to to give an instrument some effect where otherwise it would
Peake 113 have none. as when A gave a note of hand to B. without mentioning the consideration. B. may prove there was some. ———

Lecture 5th.

As to patent ambiguities — These are not to
Gilb. Ev. 15 Peake 110 Bac. 82 be explained by parol proof — because it would be to make that pass by parol which the Law says shall not pass by parol. ———

" This rule is universally true as applied to the construction of Contracts. but not as to the words & equivocal import. — In the latter case you may prove what was intended. thus where an absolute deed is given you may prove it to be a Mortgage by facts which are inconsistent with an absolute deed — as the Grantor being in possession paying a Note: paying interest: paying rent the grantee dying,

tined a part of the same Land of the Grantor &c
Parol testimony is admitted to aid an
Equity; the Equitable construction often
differs from a Legal one. Now the rule is
you may introduce Parol testimony to ~~explain~~ apply
the Legal construction by applying the Equi
table construction. Thus A devises 100£ to
B. B is refused and made Exr this Executing. in
this case Lord Hardwicke admitted parol ev-
idence to shew that it was A intention that
the refuse should have the surplus. ———
"Another species of Proof not yet considered is
what is called "presumptive Evidence." ———
Evidence sometimes arises from a presumption
of Law. — sometimes of Equity. sometimes from
the act of the Party — and sometimes from
circumstances which cannot upon a rational
hypothesis be explained without supposing
the existence of the principal fact.
"The two last of these will be more particu-
larly considered. ———————————

1st Of Evidence presumed from the act of the
Party. as if a Clergyman receive tithes and
is sued for non residence. now Proof of this

page 468 Rec 2

Peake 113
Doug. 25.
Bull NP 294
Gilb Ev. 16

3 T.R. 305.

*fact is sufficient to prove him a Clergyman.
*So if an Inkeeper write over his door that he is licensed to keep "Post Horses" and afterwards commits an offence against the "post house act. this notice is sufficient evidence of his licence. - *So too where a man lives with a woman to whom he has not been married and suffers her to pass to the world as his wife. he will be answerable for her contracts though she be actually married to another man. - 2nd Of particular facts which create or raise a presumption. - - - - - - - - - - - - - - - - - -

3 T.Rep 637
Peake 20

*Here are sundry instances of Laws which cannot be abolished.

Peake 20-1
2 Esp Rep. 637
5 T.Rep. 14.

"The rule on this subject is a proof of such facts as are consistent with the claim of one party, and inconsistent with the claim of the other, will enable the Jury under the direction of the Court to presume the particular fact in controversy. So a vicarage has been presumed after very long possession. "possession for 20 yrs is sufficient to presume a Grant. *So where a Bond was not put in suit for 18 or 20 yrs and no interest had been paid. the presumption was that it was paid.* - - - - - - - - - - - - - - - - - -

Peake 22
12 Coke 5
Comyn 103
1 T.R. 399

3 T.Rep 159
2 Blk. Rep 1228.
Comyn 595
*Here are instances of bad titles made valid.
1 B.C.Rep 532
2 Eq. Ca Abr 825
2 Vern 1376
3 Brown 371

"Isolated Rules not before mentioned

When Character is not put in issue. you

cannot enquire into it: but when the Defendant calls a witness to prove his good character the Plaintiff may impeach his general character. So in a criminal prosecution which is subject to corporal punishment. the Defendant may prove his general good conduct. but not when he is prosecuted for penalty. though the action arose in consequence of a judgment of his own. So the party whose witness is impeached may introduce testimony to show that he has always told the same story. for the purpose of corroborating his testimony. No witness is compelled to testify to what will subject him to a suit (i.e.) a Civil action. or charge him with debt. Testimony which does not go to prove the fact in issue is inadmissible — if it were not so the minds of the Jury would be clogged. but if it is all relevant to the point in issue it will never be rejected.

Any testimony thus bearing upon whole or in part on the issue is relevant and must be admitted though it do not prove the issue.

Peake 8

Peake 8

7 T.R. 178
1 Str. 400
2 Ld. Ray. 1003

This statute was not made till 46 Geo. 3rd

2 Mod. 180
1 Leg. 654
Doug. 374
2 H. Bl. 1288

Evidence.

Examination of Witnesses.

At Common Law testimony is obtained only by Witnesses "viva voce." This is the best, because you thus have the benefit of examination and of cross examination: and you can judge from the appearance: besides depositions may be obtained "per favorem". The rule formely was to examine the witness on the "voire dire" as to his interest, or to call other witnesses to prove the fact. The party against whom the action is brought has this election: but not both.

+ Peake 180
4 Burr 2214
10 Mod. 109
1 Hawk. 458
4 Bacon 225
1 Salk. 283
12 Mod. 234.

If he appear to be incompetent the objection must immediately be taken. For if after examination and cross-examination he appear to be incompetent no objection can be taken.

Peake 180

But the modern rule is, to swear the witness in chief in the first instance: and if at any time during the trial he appear to be incompetent the objection may be taken.

7 Bac. Ab. 701

When a witness is liable to any legal objection he is first examined by the Counsel who calls him, (or on whose behalf he is called to give evidence of the fact he is to prove). Afterwards the Counsel on the other side cross examine

him: and he may be asked any question which
relates to the cause: - and whether he can be
asked any question foreign to the cause for the
purpose of affecting his credibility is not set-
tled. It was always law that a witness
could not be asked any question which would
tend to criminate himself and subject him
to punishment. But whether he can be ask-
ed any question which tends to disgrace him
and render him infamous (though not legal-
ly so) is a disputed question. Lord Kenyon
decided that he could. Gurney Chambers are
divided on this. The reason and idea is a man
cannot be supposed to answer for every trans-
action of his life and one question ought
not to blast him forever. If a man is "infa-
mous" you must prove it by record if "unde-
cided" stamp his general character. On the other
hand the jury are to judge of this credibility by
their character. It is a general rule that
leading questions must not be put to the wit-
ness - he must tell his own story without
any assistance from either party. But of
late years the rule has been relaxed: and

2 B & Ald 1008 +
1 Stark 400

Bull N P 292 +
7 East - 108 +
3 Do - 77 +

4 T R 414 n

Peake 129
Co Litt 158

Salk 153 -

Evidence

Peake 189 o

leading questions have been put to whom the Witness evidently appeared hostile to the party who called him. This is left to the discretion of the Judge. — The Witness when examined must testify to facts within his own knowledge.

37 L.R. 764

But he may refresh his memory with a copy of memorandum from his own Book. if he cannot positively speak from recollection. And if he has no knowledge except from his Book. that must be produced. — He must speak to the fact. And in questions of "Science" persons skilled in that may give their opinions on oath. Thus Physicians

1 East. 407
D° — 89
2 Russ. & M. 113

In a late case on this question was called the attention of the Court to the practice of examining Solicitors & Counsel who had been employed in the cause

this information the rest of Mankind are in need of. to enable them to form a correct opinion.

Number of Witnesses

At Common Law no particular number is necessary. One is as good as one thousand. You must have as many as will satisfy the minds of the triers. as to the truth of the fact you wish to establish.

Peake 144.
Co. Litt. 6.
Shaw 138.
2 Ray 220

The Civil Law recognizes two. and this is the practice in most of the Courts in Europe. There are some exceptions to this rule at Common Law. In perjury are Traitor one oath is as good as another. The reason is that a due

10. Mod. 193
Peake 7

regard is to be paid to the lives and liberties of men which in intermediate times would be liable to danger from particular Plots and Conspiracies. — In Chancery when a Party answers on Oath the other party must in order to introduce two Witnesses at least to disprove what he has said. — In Connecticut we require two Witnesses in all Criminal Cases or what is equivalent thereto. —

4 Bl. Com. 357
Peake 10.
2 Vern. 554
2 Hawk. 428.
* or what is equivalent. —

Mode of procuring Witnesses.

When they will not appear voluntarily the Law compels them by a Writ of "Subpœna" and if the person whose testimony is wanted has in his possession any Deed or instrument. The production of which is necessary a Speicial clause may be inserted Commanding him to bring it: hence it is called a "Subpœna duces tecum" This Subpœna is issued by the Court and signed by proper Officer and then delivered to the Witness a reasonable time before the trial so as to enable him to arrange his affairs. On delivering a Copy the Original must be shewn him. To lay him under an obligation to attend a reasonable Sum must be tender-

Peake 191
1 Esp. C. 405

d.

Evidence

Peake 192.
4 Camp. 550.
1 Atk. 610.
2 Ves. 115.
1 Ves. 150

tended to him for his travelling expenses to and from the place of trial, and for his attendance while there in proportion to his rank in life.* If this is done and the witness refuses to attend he will be liable to an attachment, a "Capias" issues to take his body, or an action at Common Law for damages.

If a witness refuses to testify he is to be imprisoned during the Session of Court for Contempt.* "If the "Subpoena" is not complied in a reasonable time, or if the witness is not tendered his expences, he is not punishable for non-attendance. If the witness is in Custody an "Habeas ad testificandum" is necessary. ——

To procure it application is made to the Court or to a Judge upon an Affidavit stating that he is a material witness. ——

Upon this the Judge if he thinks proper will permit it. If the object is to remove a prisoner in execution the Court will refuse it. If the witness is in Custody on a Charge of high-treason or a prisoner of War the Court will not grant it without the Consent of the Secretary of State.

Peake 193

* A person intending not to attend after having received a subpoena is liable to be committed for a contempt of Court, or to pay a sum of money.
Peake 192

* Or a rule nisi will issue against him to shew cause why he should not be committed, and if he does not shew sufficient cause he will be committed.

* If the witness under the Capias and Habeas be ready to pay him his damages he will be entitled to damages but there is a difficulty, as to how and upon what grounds to determine whether the Caption was just and reasonable.

* If a master of a ship is not liable if guilty of smuggling since the Statute in England has exempted the Master from the penalty of the Act.

Forbes 390
Comyns 672
3 Burr. 1440

Evidence.

"When the writ is granted it is delivered into the hands of the Officer in whose custody the witness is intended into Court to try him on reasonable charges being paid. ——— Doug. 419 Tidey 916 Nuthan

Witnesses free from Arrest.

Peake 60

"The person of a Witness is free from Arrest when going to: staying at: or returning from the place of trial: " eundo: morando: et redeundo." — (c.c.) If he is if he is arrested the Court will discharge him and assume the Offence. In Contr he cannot be arrested for he has his protection before he sets out: "This rule has been extended to an Attestation Courts are not rigid in extending it. Thus a witness was seized early in the morning; he staid to dine: and was arrested. The Court discharged him. Another was released at 4 O'clock P.M. He staid till after dinner the next day: he was arrested and discharged. although his place of residence was only twenty miles from the Court House.

Bac Abr 101
Bellod 381
Peake 46 270
17 Vin 573
4 Com Dig 274
Peake 193
2 Str 1119
1 Salk 544
Jenkins
Bracton 15
3 East 89
2 Bl. Rep 1113
Peake 193 +
Doug 595
Gilb Ev 308 +

Evidence.

Written Evidence.

7 T.R. 264
4. S° 432
2 Ro.Ab. 402
4 - 4 - 418.

"This divided into two kinds. Viz Public and Private. The former is subdivided into matter of record and those of an inferior nature. — 1st Matters of Record.

These are of two kinds. — 1st Acts of Parliament. 2d Proceedings of the Kings superior Courts of Justice.

Poole 267
Esp. 732

1st Acts of the Legislature (or Parliament) Every thing done by the Legislature in its Legislative Capacity. is of record. and these records can never be questioned as to their authenticity.

Cro C. 7. 13
Co Litt. 254
Poole — 27

Still they are subject to the decision of Judges. as to their Constitutionality. For the method of Pleading vide. title Municipal Law.

Mode of Proving them.

A public Law is not a subject of proof: it is a general Law of ~~the Land~~ the Land. which the Court and Jury are bound to know:

They are usually read for the purpose of refreshing the memory of those who are to try the Cause.

Esp. 733-4
Buls. N.P.
Pinn. 284

A Statute Book is prima facie evidence and may be introduced and read to examine a man sworn as a Juror if sworn. given by another Statute.

A Private act is not taken notice of ju-

dicially

Evidence.

judicially by the Court & cant must be proved. — 2dly Records of Courts. These are evidence of the Law, to which every man has a right. Therefore they cannot be removed to any new private purposes. they must be proved by copies. which Copies are of three kinds viz 1st under the Great Seal. — 2nd under the Seal of the Court. in which the proceedings are 3rd A copy examined by a Witness. and Sworn to by him on oath. — As to Copies under the Great Seal the Jury are bound to give credit to them under pains of attaint. — It is a general rule that the whole record must be construed together. Records under a Seal of Court are of higher authority than sworn Copies. Courts are more exact in their records than any other person. therefore no other proof of their authority is necessary. than the production of a Copy under Seal. "Letters Patents are matter of record and are not being under the Great Seal & stand in need of further proof. — In Connecticut. Copies under the Seal of Corp^n are always authorized when necessary. As to copies compared with the original by a third person. they are called "Sworn Copies."

Bul. N.P. 220
Peake 28.

Bul. N.P. 220
10 Coke 93
Esp. — 745
Fin Records of Courts &c.
Doc. Gilb 14-
3 Inst 173
Peake 28
Esp. 745
Bl. N.P. 227
Hard 118-20
Gilb 18 19
Peake 30
2 Sid. — 145.

Peake 28 note

Bul. N.P. 228.

Evidence.

1 Ves 1st 257
1 Mod - 117
Salk. 228.

Sometimes Copies are admitted without being sworn to, as when the Copies are lost. If a Rent Roll. has been lost the Court will permit a Jurat one to be made if the Contents can be ascertained. — In Courts of Law Copies under the Seal of the State, when to go out of the State are to be authenticated by the Clerk & Chief Justice.

2 Bac - 22
Peake 30

Peake 38
Gilb 24-6
Bul N.P. 229
Doug 50.

In England Office Copies not under Seal are granted out and authenticated by an Officer appointed by Parl for that purpose without further ceremony. Copies of Judgements in

Cowp 17.
Peake 30.

England must is general be Stamped. —

Co. Lit. 117
Eff 741
1 Mod 73.
Peake 29
2 Rol. Abr. 674.
Eff. 741
Ld. Raym. 14
9 Coke - 31
2 Raym 1534
4 Coke - 71.
Bul N.P. 230
Co. Lit. 117
Eff. 742

Records can only be denied by the Plea of "Nul tiel record." ——————

But when issue is on a matter of Fact connected with a record. There shall be a trial by Jury. When the Record is the ground of the action it can only be put in issue by a Plea of "nul tiel record" But when it only is mentioned the matter of Fact is to be tried by the Jury. If the Record is put in issue a day is given to bring it in. If it is a Record of an inferior Court the Party pleading it must sue out "Certiorari" to the Officer of the Court who claims it. If of a Superior Court he must sue

Evidence.

out of Chancery a "Certiorari" into which Court it is returned and there sent by a "Mittimus" to the Court where it is pleaded. Eff. 743

An Officer whose business it is to keep the records may be examined as to the State of them. but not as to the matter of them. Peak 28 1 Stu 210

If words have been struck out or interlined the record erroneous. Witnesses may be examined to shew that they were improperly struck out: but not to falsify the record by shewing that the alteration whereby the Record was made correct was improperly made. 1 Bl Rep 644 4 Bur 2207.

Having thus shewn how a Record is to be proved. We now come to consider when and how far it is evidence. A variance in a Fact material between the allegation in the pleading and the record prevents the record from being evidence at all. Thus the Plaintiff in Debt on Judgment declares in Trinity Term 1798. and on "nul tiel record" it was Easter Term 1808. it was judged a failure of record. But when it is introduced the next enquiry is for and against whom is it Evidence? Eff. 744 87 1 Ves. Blk. 48.

Evidence

The Rule is that a judgment or Verdict can be given in evidence only between such as were parties to the suit in which it was given or their privies. They ought to be bound by it. For this an established rule in Law that a fact which has been once directly decided shall not be disputed by the same parties in the same actions or in one similar. Thus Judgments of a Debt is conclusive evidence against the party to such a judgment and his Representatives. On the same principle that a judgment concludes from disputing the Debt it also precludes the plaintiff from recovering a larger sum than he has awarded him. Therefore if the Plaintiff claimed a Debt compared of items and in attempting to prove them he fails as to part. he cannot at a future time when he has more testimony recover the other part. The judgment is conclusive. But if he were at the suit to give this part of the demand in evidence he will not be estopped by any Record from recovering it.

Peake 34. Esp. 730.

7 T. Rep. 207 1 Esp. Ca. 84

Peake 350 6 T. Rep. 607.

Evidence.

So too when a judgment as to personal prop-
erty is given by the Defendant on merits. it
precludes the Plaintiff. from making a de-
mand either in the same form of action or
one of an equal degree. — Thus in action of Trov
for goods. & the Defendant nonsuit on the
merits of the case. Judgment is a bar to As-
sumpsit for the amount of the same goods. —
The same rule holds in actions which con-
cern "Real estate." for if a dispute arises con-
cerning Real property. and any fact comes di-
rectly in issue: the finding by a Jury on that
fact. is received as evidence of it. in any future
dispute between the same parties. or those
claiming under them. though in respect of
other Lands: for the object of a dispute makes
no difference as to the rights.

Peake 36
2 Bl. Rep 827

6 Cater 7

Bul. N.P. 232.
Peake 37.
Gilb. 29
Esp. 736.
3 East 346.

But a Nisi Prius judgment is no evidence ex-
cept between the same parties. or those claim-
ing under them: for a man ought not to be
— bound his cause is decided: and then
would be no benefit of a Cross examination.
And it can be given in evidence between

Esp. — 730
Peake 38.
1 Stup. 68.
1 Ld. Ray. 730 —

Evidence.

Peake 37
Off. 737
Bull. N. Pri 232
Holt 53.

the same parties only when it was a matter which was in issue in a former Cause because then is no reason if the Verdict is false: The Jury are not liable to attaint. — But the Subject of Controversy need not be the same if the point to be decided be the same The benefit of this Rule is material (i.e.) in an action by A against B and a recovery A could not give the judgment in evidence against C. So C shall not be allowed to give it in evidence against A for it would be unjust to suffer that to be given in evidence against a man from which he could not have derived any benefit. —

3 Mod 143
Hard 472
Langley's Hammond " 85 (Case)

Peake 38
Off. 736
3 Mod 141
Hard 472
Gilb 84

Peake 7

"That is an exception to the Law Rule in the Case of Outlawry in Estate" when a man is Outlawry in Estate with the Verdict he may give the Verdict in evidence for him: though had it gone the other way it would not have been against him. Thus if there were Devisee & remainder men in the same Deed a Verdict

to

Evidence.

for one is evidence for the other: but had a Verdict been against the Tenant the remainder man would have been dispossessed. So too a recovery against a tenant for life upon the aid of the remainder is prayed is evidence against the reversioner in an action against him by the tenant: but if aid is not prayed it is no Evidence. On the same ground if the reversioner is not vouched judgment is no Evidence against him. Otherwise if he is vouched.

Peake 30
Hard 421

1 Ld Ray 730
Salk 283
Peake 39
Sylv 32

To the rule that a judgment or Verdict is only Evidence between the same parties there is one exception. Viz Wherever the question is of a public right all persons standing in the same situation as the parties are to be affected by it. It is evidence to support or defeat the right claimed. As a Verdict finding the rights of a City to tolls - for the custom of tolls is "by local" whether Lands are a parcel or not of a Manor. How far Verdicts in Criminal Cases are Evidence in Civil and "vice versa" is not well settled. One thing is clear a Verdict in a Civil Case is no evidence of a criminal intent.

Peake 40
Salk 283

Cowp 181

1 Burr 120
Salk 30
3 Bul 32 60
Peake 27
1 Peake 355

Evidence.

Gath Crown
Spaw. 944
Peake 91 &
12. Mod 371
Gilb Ev. 31
Com. Dig. 411
Ld Raym 1538
Str. 425.
38 Edw. 244.
* see Rex v Hall on opposite

"Thus in action of assault and Battery. —— The better opinion seems to be that a Verdict in a Criminal Case is no evidence in a Civil one for the Verdict might have been procured by the testimony of the party interested: and the Court cannot know judicially that it was not. * It is said however if his testimony formed only part of the evidence the Verdict is admissible. This Spaw Judge Reeve thinks is questionable. Verdict no evidence until final judgment is rendered upon it (i.e.) no Evidence that the facts have been legally decided. Writs issuing out of the Courts at Westminster are not considered as Records. Likewise are returned & filed in the Courts. If then a Writ is the gist of the action, you must produce a Copy. for it is the best Evidence the nature of the case will admit of. But when the Writ is only an "inducement" to the action. the fact of it's having issued may be proved by the production of the Writ itself. because by possibility it might not be returned in which case it is no Record

W. Jon. 30. 50
Bul. N.P. 234.
1 Strange 251

Gilb. 40
Peake 501
Gilb. 299
Bul. N.P. 234

As Hamilton vs Moore

Evidence.

It is a general Rule that before a Copy of a Record is evidence the record should be drawn up in form for it is not a Record until it is brought into Court and filed as a Roll. Though execution may be taken out immediately upon the Judgment Paper being signed by the proper offices of the Court. — Until this is done it is transferable to any Place and the original may be introduced. But when it is the practice of the Courts to consider its minutes as the Judgment itself without making further entry. Copies of such minutes are good evidence. ———

Gilb 22
Peake 33.

As Copies of minutes of the House of Lords of a Judgment given by them on an Appeal from the Courts of Chancery. When a Record is completed a Copy of the whole and not of a Part must be produced: the reason is a partial extract may have a very different import from the whole taken together. —

Peake 34
Comp. 17

Therefore if an action is brought against a Creditor for taking Goods after the Judgment

Peake 34
3 Inst. 173
Gilb. 17-23.

is reversed. the Defendant must shew both the Judgment and Execution. for if the Judgment was reversed he knew it. But had the action been against an Officer he might have justified by shewing the Execution only for he is not presumed to know that Judgment was reversed. A Verdict for or against the Plaintiff with proof of the Evidence by him given. shall be Evidence in an action by another against him for the same thing. As in an action by a Common Carrier for goods delivered by mistake. a Verdict for or against the Plaintiff. with the proof by him given shall be Evidence in an action by the owner against the Carrier for the same goods. But it seems that the Verdict was not given in Evidence as the Verdict of a Jury determining any Point but as Evidence of a Confession on record by the Carrier that he had the Goods of the Person who attended to bring the action: and to lay a ground for proving that a Deceased Witness swore.

1 Ld. Raym. 733

Com. Digest. tit. Evidence A 5 fol. 738 Peake 34 note Bull N.P. 243.

Evidence.

Lecture 8

Public Evidence not of Record.

These writings are of various kinds, and some of them are of so high authority, that new copies of them are admitted: and to others a degree of credit is given, which is not given to more private instruments. ——

Proceedings in a Court of Chancery — These are not matters of record, for the judgment is — "Secundum æquum & bonum" — and not "Secundum Legem Angliæ." Of course they are not precedents of justice, but founded on the particular circumstances of each case.

Peake 51
Eq. Ab. 75.

Eq. Ab. 75
Bul. N. P. 235
Peake 61.

Bills. It was formerly a rule that a Bill in Chancery was evidence against the complainant of the facts therein stated: for it should not be presumed, that it was presented by the Council without the privity of the party: or that they mingled with it any facts, which are not true. But it is now holden, that a Bill is no evidence for any other purpose, than to prove that such a Bill was in fact filed, or to prove such

1 Sid 232
Eq. Ab. 75.
Peake 53.

parts as are the subject of reputation and
hearsay evidence as Pedigree &c. the reason
is because most of the facts stated in the Bill
are mere suggestions of the Counsel, to extort
an answer from the Defendants, so a Bill
of discovery is Evidence only that it was filed.
Answer. Though the Bill is no Evidence yet
the answer in Chancery of a Defendant is
Evidence against him. for it is a Confession
on Oath. Yet you will mollent tis a Confes-
sion only. and therefore not admissible in
Cases where a Confession is not. ——————
On this ground the answer of an infant by his
Guardian is not Evidence against his rights.
So the answer of the trustee against the
"Cestuy que trust" &c. Doubts have been enter-
tained how far a "feme covert" should be pre-
judiced by her answer. In a Case where the
question was whether the wife should an-
swer jointly with her husband or not the Lord
Chancellor said "I do not now give any
opinion whether the answer may be read

against

Bul. Nisi-
Finch. 235.
Peake 54
7 Rep. 2 & 3.

Bul. N.P. 238

Ld Ken. 220
but facts admit-
ted on Pleas or
Oyer of Deed are
good in a Suit
for rent reserved
Call &c.

Peake 54

Cath. 19
Peake 54
Esp. 452
2 Ves. 70
3 Mod 239

2 Ves. 54 and
3 Atk. 235

the wife who discovers or not, but as in all
times hurts her the wife as well as the hus-
band has been compelled to answer. I would
not undertake to say what has been
the constant practice. In the above case his
Lordship said he would not compel the wife
to answer any thing which might subject
her to a forfeiture, though the husband sub-
mitted to answer. The objection that it was
"res inter alios acta" – does not apply here as
in case of other legal proceedings. For in an
action against B the answer of A his part-
ner to a bill filed against him by other cre-
ditors was admitted as Evidence of the facts sta-
ted in it. So also was the voluntary affida-
vit of one man who was jointly interested
with another in an action against both –
"As a general Rule the whole answer must be
read for it is read as the answer of the party mak-
ing it. On this ground where one answer
had been put in by the Defendants, and except
ions were taken to it, and he put in a se-

cond

Authorities above.

Peake N.P. 103.

Peake 55
Gilb. Evid. 51
Evidence 51, 57.

5 Mod. 10

Peake. 55
5 Mod. 10
1 Sid. 418.
Esp. 1 752.

sworn answer and he was allowed on an information for Perjury to read the sworn answer in explanation of the general terms of the Statute. When the sworn answer is used as Evidence in a Court of Law the Party producing it makes it evidence for the Defendant of all facts stated in it: though not conclusive for the Plaintiff may disprove them: or the Jury if they have cause may believe one part and disbelieve the other: (as) they may in the same direction which they do in other Cases in drawing such conclusions or results from all the circumstances of the Case. But in Equity the rule is different: for it is there holden that if the Defendant admits a fact in his answer and insists on a distinct fact by way of avoidance he must prove it because it may be that he admitted it out of ostentation that it might be proved and therefore such admission ought not to be conclusive. Thus so far as to Oath for

Peake 56.

Peake rule 61
Gilbert 57
Bull. N. P. 237
Esp. 752.

truth:

both. restrained even he says in expectance. There is one instance in which part of an answer is evidence without producing the whole. viz. "Where a Witness in answer has shewn himself interested in the event of the suit." — Affidavits. — Affidavits answer by similar to answer in Chancery: they may be given in evidence against any person who has made them. They are however distinguishable from answer in Chancery. 1st an Answer is always given in under oath: therefore by shewing the Bill and Answer the presumption is that it is sworn to. "Prima" "Facie that presumption can be rebutted" for tis a standing rule that there can be no such thing as an answer unless it is under oath. But a voluntary Affidavit must be proved to be sworn to for tis not sworn to of course. E.g. One made by the Vendor of an Estate before a Master in Chancery to satisfy the Purchaser that it is free from incumbrances. But an answer in Chancery always

Peake 57
Bull N.P. 238.
Eff. 763

Peake 57
Gilb. 32
Eff. 763.
Bull N.P. 238.

Bull. N.P. 238
Peake 58

being

Evidence.

Being an Action or Indictment for Perjury
Proof the hand writing of the Master before whom
Peak. 38. it purports to have been Sworn and of that of the De-
Esp. 764 fendant himself, has been held sufficient Evidence of
B. Mod. 35 the Commission of an Oath. But Chamier Law
B. & N. 238. goes so far as to say that when there is proof there was
2 Bur. 1187 a certain Cause and that the Affidavit was used in
3 Mod. 61 that Cause it may be read without proof of its being
1 Show. 397 Sworn to. for the presumption is that it was Sworn to
Esp. 754 for it should. it never could have been read
In Connecticut an Answer is not Sworn to of
course. it never is unless required by the opposite
Party. Consequently here both answers and Affidavits
must be proved to have been Sworn to. ——
2nd A Copy of an Answer may be given in Evidence
for it is the best Evidence the nature of the Case
B. & N. 293 will admit of. The answer is part of the Files
Peake 53 and Records of the Court. like Rolls &c
Esp. 704 But a Copy of an Affidavit is not admissible
it is not the best Evidence for you can produce
Gilbert 87 the Affidavit itself. It is a private writ
tho not a public Record. ——

Lecture 9th

Depositions. These usually come from the Courts of Chancery. though not always: but they are also subject to like Rules. These are not received as Evidence on the same principles as an Answer viz as an admission of the party. but as the next best Evidence in the Room of some other which his adversary has been deprived of. and therefore it is that in no case when a Witness is living. and to be found shall his Deposition be read as Evidence of the facts deposed to: or for any other purpose than to confront and contradict him. But if a Witness is dead or cant be found. after diligent search. or falls sick by the way (pending the trial) it may be a good cause for granting the trial. This Deposition is Evidence.

If a Witness make a Deposition and afterward become interested his Deposition is no Evidence and he himself is not an admissible Witness.

These Depositions are usually admitted because it is the representation of a Witness under oath. and liable to cross-examination. and it is the duty of the Commissioners to sift the whole truth.

These Depositions are sometimes taken in

Salk 285.
1 Show 1
1 Stra 101
2 Ld Ray 1186.
Peake 58-9
Esp 757.
Mk 445.

2 Str 940
1 Mod 283
Godbolt 320
Peake 89
Esp 735.
B.N.P. 239.

1 Str 101
1 Salk 286
Esp 756
Peake 58-9
(one note illegible)

7 Cake 70
1 Peake 39.00
2 P. Wms 363
4 Burr 2063

Evidence.

"in Cathedram nec memoriam" as when the Court
Peake 26 resides are very aged and infirm or about to leave
the Kingdom: and here you must shew that you
Peake 64 are in danger of losing the testimony. Depositions
Hard 479 are not Evidence against persons who are not par-
Espr 756 ties to the Suit for the same reason as in the
Bull N.P. 239 240 case of Judicial Exceptions in the case of Customs
4 Burr 2290 and Tolls. questions of public right. hearsay and
reputation. — To do by Special act of Par-
Doug 244 liament. 5 Geo 2nd Depositions on Evidence
against all persons. As a general Rule it ne-
ver to give in Evidence any Answers Depositions
Affidavits &c. unless a foundation must be laid by
proof of all the former Stages of the Bill
to make way for the answer. the Bill and Ans-
wer &c. 2nd The reason: 1st That the Court may
see the whole bearing of the Evidence. 2nd That
the Court may see whether it was a regular pro-
ceeding. If it not regular then the Answer or
Depositions would have only the effect of a mere
Stra 478 voluntary Affidavit and if made by a Slave
Peake 26
Espr 5
Ch. Ca. 33. 35
Hyam 61 he could not be received as any Evidence at all.

because then the parties could not have the benefit of Cross examination. As to the regularity of the proceedings the Rule is. if the Plaintiff was irregular in his proceedings so that no cause was before the Court. the Deposition is no Evidence in another cause. if the cause was before the Court. but dismissed because the Subject was not fit for Equity to decree. Depositions or Evidence. But if the Bill is lost or cant be found. the Answer is permitted to be read without it. As antient Depositions. have been received as Evidence without Bill or Answer. for formerly the Court did not insist on Bill or Answer but the Party ought to be satisfied by great length of time or some reason why the Evidence that the Bill had been lost. and in what way.

Decree in Chancery. That decree is Evidence on the same principle as a Judgment in a Court of Law and subject to the like Rules. Viz. That when it respects private property or individuals it is only Evidence against the parties to the suit or others claiming through them. But

Peake 67
1 Vern 735

Eq. 757
Hob. 112
Bac. N.P. 240
Peake 87. 8.
2 Hen. 31

Peake 88.
1 Hale 21
Doug. 292
Salk. 283
2 Show. 281

But when the question is of a public nature it is then Evidence against all persons standing in a similar situation with the parties.

While the Decree remains on Paper it cannot be read in Evidence for the purpose of proving its contents without all proving Copies of the Bill and Answer, unless they are recited at length in it

But when the only object of the Evidence is to shew that a Decree was in fact made or the Decree has been established under the seal of a Court and enrolled, it is of itself evidence and the opposite party may, thus in the latter case shew that the point in issue in that Suit was different from that before the Court.

Bull N.P. 235 Peake 68 Comyns Digt Title of Evidence C1

Proceedings in the Ecclesiastical and Admiralty Courts. The Rule is that decrees & sentences of these Courts having a competent jurisdiction is conclusive Evidence of all matters determined whenever it arises collaterally in any other Court. Thus a probate of a Will of personal property, Letters of Administration or a Sentence in a Matrimonial Cause in the one Country or an

Peake 69 Ryde 158 Bull N.P. 244

1 Lil. Ab. Law of Evidence 67

adjudication of Judge &c in the other on Evi- 2 Mod 231
dence of the rights of the parties The right of 1 Vern 53
personal property under a Will can be proved Gen Eq 46
in no other way, than by probate And whether Holt 108
with or without seal can be permitted to 4 Ves Jr 258
shew that it was improperly granted. or after
it is repealed to avoid any payments made un- 3 Ves Jr 125
der it. But it may be shewn that the seal to
the probate was forged. or that Letters of admini
tration have been repealed. to prevent any right being
claimed under them. for that does not contravt. 1 Sid. 359
the judgments of the Ecclesiastical Court. but H. Bl. 405
shews that no such judgments. But a Pro-
bate of a Will is no evidence in any action or
question concerning Lands. for they have no Jurisdic-
tion over Land. So in an action of Ejectment for
Lands. Judgment &c in the Court of Exchequer would
be conclusive in an inferior Court. And it 3 T.R. 330
was holden that a Verdict of acquittal is conclusive 2 Bl. R. 1174
Evidence. To make the judgment evidence. the question Burr. 2 2 2
must have come directly before the Court and it 5 Ves. 255
must also have been decided. Burr. 2 2 4
1 Salk 280
2 Str 757-60
2 Wilson 22
Peake 148
3 Bos & P 31

Section 10th

Evidence

Proceedings of Foreign Courts.

"The judgment or sentence of a foreign Court is received as Evidence of the Right it establishes or such directly found by it. When the party who claims benefit by it applies to our Courts to enforce it, and voluntarily submits it to their jurisdiction. They treat it not as obligatory to the extents to which it would be in the Country where it was pronounced but as "prima facie" evidence of the right of action. and they will examine into the merits &c.

Section 70 Dan' 1 274 Blk 289

In all other cases our Courts give entire credit and faith to sentences of foreign Courts, and consider them as conclusive. Therefore for or against a Ship any question arises on the Law of Nations and a foreign Court of Admiralty acts on that Code adjudges a Ship to be lawful prize as for a breach of Neutrality &c. the sentence is complete and conclusive Evidence of the fact on which it is founded against all the World.

Section 70, 71 * Sentence in a Ct of Admiralty given under the Law of Nations, the Judge would act the same way here

Section 71 8 T.R. Pots 192 - 230

If they state the Evidence from which they draw the conclusion no Court in that County can review into their consideration whether such conclusion was just or otherwise. In this case however the adjudication is only Evidence of the Conclusion on which the Condemnation is founded. Such as the Treachery of an enemy or the like and not of the facts stated by way of Evidence. If a Foreign Court of Admiralty condemn a Ship as a Lawful prize without assigning any cause it is Evidence that she was not neutral. But if a Foreign Court state the facts on which they found their condemnation and it appears from those facts and also the conclusion they have drawn that the condemnation was not from any violation of the Law of Nations but for not complying with some arbitrary regulations of their own. The sentence is void and of no force in any Court of Justice. The Subject must be within its jurisdiction. So the Court itself must be one regularly established and acknowledged by the Laws

Peake 71
3 Rep. 192

Peake

Park - or
Peake 413

Peake 414-15
Peake 71
3 Rep. 5 25
& 434-5 n

3 Rep. 208

of Nations: not a mere arbitrary institution as a condemnation before the Consul of a Belligerent State residing in a neutral country.

Peake 71-2

But such a proceeding before the Consul of a belligerent State resident in another in an alliance offensive and defensive has the same effect as if taken in the State where the Judge who condemned for the interest of the two States being united. one may authorize the other to act a Court acting on the Law of Nations. for their common benefit. & any place within the hostile territory. Proof of their Seal is got that generally given by copy under Seal of the Court in which they were. but if it be duly well settled that some evidence should be given to authenticate the Seal.

2 Esp 473
Peake 72.

Peake 72-3
3 East. 221.

Award. If the parties think proper to submit to an arbitrament the Award is as conclusive as a judgment in a Court of Law. Though in the case of the real estate it passes no title from one to the other yet when the right is determined to be in one it cannot be disputed in Ejectment.

Peake 75
3 East 15 n.3.

Lut. Villa Sabina

"Acts of the State. Sign[ed] Proclamations Articles of Peace &c are proved by the printed Gazette published by the authority and under the control of Government. This is the strictest Evidence that can be given on this subject. The Registers of the Navy Office in the Usual & the method pursued to attain all persons dead with the mark "D" is sufficient Evidence of Death. So is the daily Book of a public prison to prove the time of a persons discharge. So is the Log Book of a Man of War to prove when a Ship became a part of the convoy. To prove a particular custom a printed history is no Evidence.

Surveys taken on public auction are Evidence to contradict the rights of Individuals not named in them. Motion denied on the ground that the acts being done under the direction of the public for the purpose of determining a public question they are entitled to a decree & should not individuals.

The Registers kept in Churches of births marriages & burials are all Evidence, & in all Civil cases except actions for Crim. Con. a marriage may be proved by reputation. But in this case had an Im-

5 St. Tr. 4-30
Bull. N.P. 242
5 T. Rep. 1. 1. 42

Bull. N.P. 244

Peak. N. 35.

1 Esp. C. N. 427
Peake 77

Peake 80
Salk. 281
12 Mod. 345
2 Str. 834. 901

Peake 84-5.
Hob. 85 - 188
Q. 16 - 78
1 Bac. 146.
Peake N.P. 182.
1 Wilm. 370.

Peake Cas. 83.

Dilmans

Evidence

Indictments for Bigamy & the Semi-Peers who
were present at the Marriage must be called on
the original Register Produced or an exact copy of
it & such Copy the Parties may be identified by
any one acquainted with them. whether present at
the Marriage or not. The reason is that the con-
duct of the Persons who without any legal authority
assumed the power of registering them, have shewn
such an ordinance Books as to take from
them even the authority of a private memoran-
dum. Ancient Maps of Lands will be received
as Evidence when they have accompanied possession
and agreed with the boundaries adjusted by ancient
Purchases. Sometimes however this not evidence
against the rights of persons not Parties to the
making of the Corporation Books concerning
the public Government of a City or Town shew public
likely kept & the Entries made by a public Offi-
cer are received as Evidence of the facts contained in
them. So are examined Copies of them for they
are kept for public use. A private instru-
ment will not by belonging to a public body

and remaining in their custody for a number of years gain that degree of Evidence which entitles a Copy to be read as Evidence. The original must be produced. It has been decided on the same principle that Bank Books since they have come into use have been admitted to prove a transfer of Stock in the public funds. The same appears to be true with regard to the Books of the East India Company. —

This is the General Rule Viz. Whenever an original is of a public nature and would be Evidence if produced. an immaterial Sworn Copy is Evidence. —

Stange 401
Peake 90

Peake 91
Pl. N.P. 30
2 Esp. 665
Stange 593.
3 Stalk. 151.

Private Written Evidence. Section II.

As to the kind of Evidence the Rule is: the original if in existence and in the power of the Party must always be produced and if not produced no evidence of its contents can be received. If the original is in the hands of a third person. he should be summoned with a Subpoena duces tecum. to produce it. But when the original

10 Coke 92
Peake 90
35. Ed. 151

Peake 97

Evidence.

original has been lost or destroyed by accident or being in the hands of the adverse party with notice to him to produce it &c. then an examined copy or even parol evidence of its contents may be produced. Being the best Evidence in the power of the party. The original however must be proved to have been a existing instrument. if there is a subscribing Witness living and in a situation to be examined he alone is competent to prove it; because he may know and be able to explain facts unknown to a stranger.

10 Coke 92 b
3 T Rep 131
1 Str 77 - 528
1 Atk 446

But Law admits the other modes in such cases in a different form. But the ancient deeds are not thus aided partly as the Law presumes a loss or a quantum of time. The deed may be read as this would also from the duty of the Record Office.

On this ground a confession or acknowledgment of a party to a Deed whether it affects an Evidence against him or a third person will not estop this testimony. This Rule extends to all cases whether the deed be an existing Instrument or cancelled or even illegible by fire.

Peake 98.

1 Esp Cas 89
note 216

Judge 371

Peake 98.
Peake N.P.
Cases. 50.

The admission of the Execution of a Bond in an Answer in Chancery filed for the express purpose of obtaining such an admission was not sufficient of itself to account for the Non production of the Subscribing Witness.

1 East 43-53.
Peake 98 note

Evidence

Subscribing Witnesses are not necessary to the validity of a Deed. Therefore if the Name or one of the Subscribing Witnesses be by the execution of the Deed or if a fictitious person's name is signed as Witness or the person attesting was at the time of the execution of the Instrument interested & no other Evidence can be had, you may then prove the hand writing of the party himself. This however should be last resorted to. —

If two persons are Subscribing Witnesses to a Deed and one of them is made the administrator of the Obligee and Plaintiff in the action, and the other could not be found to have been in existence, you may prove the hand writing of the other Subscribing Witness who was Plaintiff on Record. A Deed must be delivered and therefore you must prove the delivery, (i.e. If you can. But if you cannot the Law raises a presumption for you which arises from the fact of Possession. This is "prima facie" evidence of delivery.

Peake N.P. 98.
Campbell's Case Jac. 34 - 1 Saunders 25.

Peake N.P. 144 - 98.
Span. Ex. 215.
1 Bl. Rep. 303.
5 T. R. p. 371
Peake. 97.
2 Bos. & Pul. 257

2 Peake 182.
do — 256

Peake. 99
Gilb. 101
Bl. N.P. 254.

Peake 91

Evidence

delivery and is good until it is rebutted. —
Sealing is necessary. If any the Seal is
broken off the Deed ceases that it passed no
Title. Chancery will allow parol testimony
to shew how it was destroyed and the better
opinion is that Courts of Law would at the
present day. This is as proper as to shew
that it was once there. On the same prin-
ciple if one Seal of a joint contract is
broken (i.e.) lost or destroyed it is void: but if
the contract is joint and several it is good.
If a subscribing witness is dead or absent
in a foreign Country at the time of trial or be-
ivas become incompetent by any reason proof
of his hand writing is sufficient and the bet-
ter opinion is that this is sufficient without
proving the hand writing of the Party to the
instrument: Thus if the Grantee is Convict
and to lay a foundation for this Evidence prove
the Situation in which the witness stands.
(One more Witnesses than one required the
testimony of one uncontradicted is sufficient.

Cro Eliz 110

5 Co 23
2 Show 287

Doug 93
Bull NP 269
7 Rep 26 b
6 Bac Ab 300
2 Ca Ab 250.
2 Phil 833.
1 P Wms 284
1 Show 34
7 Rep 26 b
Gilb 108.
Peake 100.

Peake 101

Co

but if all are dead. then prove the death of all before you prove the hand-writing of either. for although one might be alive and it could not be the best Evidence the nature of the case might admit of. the ground on which Evidence of the hand-writing is admitted is: that the hand-writing of every man has something peculiar and distinct from that of every other man. and therefore is easily known by those who have been accustomed to see it: consequently the belief of such persons is always received as satisfactory Evidence of the fact in civil or Criminal Cases. The persons who speak to this belief must have such a knowledge as enables them to form it as having received Letters from him in a course of Correspondence. having sent him words &c. merely having sent Letters directed by him is not sufficient. In accordance with this last Rule Courts have rejected all Evidence arising from a comparison of Hands. But whether the an-

Peake Ev 101-2

1 Bun. 547

Peake Ev 102-3.
13 Ves. Rep 384
Phil. N.P. 1 11-2

Peake Ev 104
Phil. N.P.
20 note.
4 Bac. Ab 117

tiquity

Antiquity of the writing matter impossible for any person to prove it from having actually seen the person write: evidence of a person who has had frequent opportunities of informing himself acquainted with the character of the hand has been admitted. So too when the witnesses differ as to the handwriting (& to the similitude of it) Courts have sometimes before a learned jury permitted the writings confessedly written by the party in question to be produced and desired them to inspect and compare them together. This is however a departure from principles, and before an illiterate jury would be productive of much mischief. When the handwriting was contended to be a forgery after a great deal of other evidence the party was allowed to examine a Clerk at the Post Office whose business it was to inspect franks and to detect forgeries, which was from the assurance of the writing he believed it to be a forgery. Lord Kenyon denies this to be good Law.

B. N. P. 236.
Peake 104
Fitzgibbons 195

Peake 105
1 Esp. Ch. 351

4 T. R. p. 497
Goodtitle 1793

Wilde Peake
[illegible] 81
[illegible]

the principle it is. but it should be admitted with great care and caution. —— —— Peake 105-7-8-
18-C. 187.

"Where an instrument is in the hands of the adverse party, no evidence of its contents is admissible untill notice is given to him to produce it: and this notice may be given to him or to his Attorney either in a civil or penal action. the reason why notice is required is that the adverse party may not know that they were expected. It is said this not necessary to give notice where an Action is brought for a Bill of Exchange. unless the instrument is particularly described. It has been decided that if the party to whom notice is thus given produces the instrument, the other party may read it without further evidence of its execution, and this has been extended to third persons who have come into possession of the instrument. Lord Kenyon denies this principle. It is also denied in the 8th East. 348th Page. Sometimes no proof of the execution is necessary, as where there has been 30 yrs Possession. Peake 107 1 Esp. C. 351 2 T.R. 474-6 3 T.R. 305.

1 Esp. N.P. C. 351 30
Peake N.P. - 185.

Peake 108-9
2 T.R. 432-4

2 T.R. p. 741

Peake. 109

Peake 109-10
Bull N.P. 235-6.

Evidence.

1 Salk 278. Gilb Ev 103. Selw. 558 Peake 111 note E. 5 Rep 45.

with no appearance of alteration. but this presumption may be removed in various ways: The production of a Parish Certificate was considered good evidence it being 30 yrs old without shewing the Stamp from whence it came. So too where one Indenture another. there recital "it has been said" is sufficient evidence of the recited Deed against the party to that wherein it is recited. or against any one claiming under him. but this seems is only secondary evidence. for some good reason must be shewn why the first Deed is not produced.

1 Salk 286. Gilb Ev 100 Peake 100. 14 Hard 120 2 Ewins. 108. 6 Mod 43.

Yet as against a Stranger it is no evidence for the admission of a third person cant affect him. and if such Evidence were to be admitted Deeds might easily be fabricated by false recitals.

Finis.

430

4255

Powers of Chancery

Courts of Chancery

It is difficult to ascertain the general powers of Cts of Chancery in consequence of the great variety of Suits subject to its jurisdiction. The peculiar jurisdiction of Cts of Chancery, not being said to consist in three particulars. Viz.

1st That it operates the reason of the Common Law.

2nd That it decides according to the Spirit and not according to the strict letter of the Law, or Rule.

3rd That it has a peculiar jurisdiction over Frauds, Accidents, and Trusts.

Such is the definition of the Jurisdiction of a Ct of Chancery by Lord Littleton, Coke and Baines. Again it is said that a Ct of Chancery differs from Ct of Law in as much as the former is not bound by precedents or particular rules.

This description is supposed to be very imperfect. It is imperfect in as the part of the

3 Mod. 1
Gilbert. 3
3 Bl. Com. 429
1 Rolle. 374

Equity Pleading.

good Definition. 1st In defining Eq of Chancery, to possess powers which they do not possess. 2dly In not granting them all that powers which they really do possess

1st It is said that as Eq of Chancery, a Court of Equity is the same of the Com. Law. — but this power had never been claimed, exercised or that by a Court of Law or in the same way in which a Court of Equity would do it. Instance. Eq of Chancery, give relief where a Court of Law. could not but it is on the ground of Jurisdiction.

There are many rules of the Com. Law which are entirely ignored. Thus before the Statutes of 3 and 4 of William and Mary if a debt or conveyed away in real property his Creditors could never have a remedy. In this case neither Law. nor Chancery could give relief. — and even now a mortgage cannot be devised or inherited. it never lies for specific performance. Eq will and Chancery can't interfere.

3 Bl. Com. 480.

3 Bl. Com. 378.

The rule that a lineal ancestor shall never succeed to an Estate is a Feature and is gone

out.

Court of Chancery

our rule of Law. yet Chancery contains
an effect the Intention of Ass. Es also that. 10 Mod. 1
is a Standing rule that excludes the half-blood. Dougl. 264.
from the right of inheriting. This examples 2 Bl. Com. 243
shew that there are many standing rules of Law Do 377
which Chancery cont. to depart. In general 3 Do 430.
the rules of the Com. Law are not to stand 2 Atk. 239
against for against reason. yet sometimes. 1 Ch. Ca. 22.
It is true therefore. that Chancery acting that
Chancery has nothing to do with Acting the
rigour of the Common Law. ——— ——

2dly It is said that Chancery decides according to the Spirit and not according to the Letter of the Rule — So also is a Ct of Law bound to decide and it is a Cardinal and standing Rule in all Law that the Spirit of it shall be the ground of all Construction. 1 Bl. Com. 61
and all other rules are merely ancillary to 2 Bl. Com. 431
this. The rules of construction are common to Dougl. 264
both Courts and so is the Rule to the construction 1 Peake. —
of Contracts.

3dly A Court of Chancery has a peculiar
cognizance of Frauds. Accidents and Trusts.

Powers of Chancery.

As to Frauds there is perhaps no species of them which can be dealt in some manner or other in a Ct. of Law. A Court of Chancery has not of course an exclusive jurisdiction over Frauds because matters of fraud are usually dealt with. The reason why Chancery usually interferes in fraudulent transactions is because their mode of proceeding is better adapted to a discovery, and the relief more complete. Indeed in some cases Cts of Law have an exclusive jurisdiction over matters of Fraud. as in a question whether a deed was obtained from a person by fraud. Sometimes Chancery will restrain relief from unfortunate consequences of an accident when Cts of Law will not, yet the latter can do it. as in the case of a deed lost or destroyed a Ct of Law will suffer a man to avail himself of it as well as Chancery. But where a man has lost a bond. he may declare on the bond say it was lost by time or accident. and a Court of Law will give him the

1 P. Wms. 5 18. 2 & 3.
Vol. 1 - 18
8 Ves. jun. 147.
3 Sc. - 151
2 Ves. jun. 203.
2 Bro. Ch. 64
Do - 671
13 Ves. jun. 287.

amount

Powers of Chancery

amounts of it. if not lost by his own negligence. which is as much as a Ct of Chancery would do. Perhaps a Ct of Chancery may have more cases than a Ct of Law. but it is not true that it has an exclusive jurisdiction. but rather because of the greater facility in its mode of proceeding and competency of relief. But mistakes are relieved in a Ct of Law, as mistakes in accounts — Contingencies which render the performance of conditions difficult or impossible: but all mistakes can be relieved either in Law or Equity, as if a Bond is ill executed by mistake. Chancery can give relief against it & do when a Contingent remainder is destroyed in Law by some matter of accident. Chancery can relieve against it.

3 Atk 177. 344
3 Ch Ca. 74

Trusts are generally cognizable in Equity and some of them only, but Cts of Law have cognizance of them in many cases as in case of Bailment where the Bailee is strictly a trustee. Chancery has in no case an exclusive Jurisdiction of Bailments, because being a mere trust

Powers of Chancery.

when there is matter had & received there
2 Bl. Com. 431. view is a trustee & there is no necessity
Do —— 432. of applying to Chancery for relief. ——
A proper Technical Trust is regarded in Chancery for the reason only that the Title in Law is not consummated. It only binding in conscience. Mistakes in written instruments are generally decided only in Chancery and this not because there is any intrinsic
1 Root — 105 quality in a mistake to render it cognizable in a Court of Chancery, but because Courts
2 Do 209. of Law would not give a complete relief, by reason of its mode of proceeding. Suppose (e.g.) a Bond is executed for 2000£. when the parties meant only 200£. and the obligee is dishonest enough to insist on the whole 2000£ now a contract cant be apportioned: the Bond is either the act of the party or it is not. it is the Jury must give the whole amount
1 Pow. Cont. 433 of the Bond. when there has been no payment.
Tidd's 31. 203 If "non est factum" might be pleaded to it the
3. Atk. — 38 obligee would suffer. as he has a right to 200£.
1 Ves. 318.
1 Br. C. C. 341.

Powers of Chancery.

A Jury then cant assess a portion as Damages nor can the Court assess Portions damages. but the Chancellor can make a decree that the Obligor shall pay the 200£ and upon so doing the Obligee shall deliver up the Bond. ——

27 Ves — 374
2 Ves. 415. 499.
1 Ves 94. 105.

Eastly it is said that Courts of Chancery are not bound by precedents and positive rules: a new invented proposition could not be laid down. as they are bound by precedents. and many times by those they would be glad to get rid of. — Thus a distinction is made between the right of Dower and of Curtesy if the Husband is possessed of a trust estate this settled in Chancery that the Wife shall not be endowed of it. but if she die possessed of a trust estate. the Husband shall be tenant of it by Curtesy. If there is such a distinction made it ought to be in favour of the Wife. for the Husband may get Heirs for the Wife. but she cant for him. —

Powell on Mortgages 112. 321.
1 Atk 604
2 Peere Wms 640
1 Atk 606
3 Bl Com 432.
2 Peere Wms 640. 686.
27 Ves. 289. 316.
3 Atk 320.

Again a settled distinction is made between a Mortgage at 5 per cent with a clause

of

Powers of Chancery.

of deduction: to 4. if the interest be regularly paid. and one at 4 per cent with a clause of enlargement. to 5 if the payments of interest be deferred. the one being an unrighteous bargain. and the other a conscientious one. Thus one positive rule. founded on precedent. nor is there the least reason for a difference in substance they on the same.

11th Feb 4.

That for all the general description of the powers of Chancery. Judge Blackstone has given one which though not complete is the best which has been given. He says the principle difference consists in the mode of administering Justice or giving effect to the same principle. which consists in three particulars. "Viz." The mode of Proof. The mode of Trial and mode of Relief. - - -

1st As to the mode of Proof. in this particular Chancery has a great advantage over C.L. of Law. as it can compel a discovery by the defendants. under oath. or if he refuse to discover. the Ct will take the allegations of the

Powers of Chancery.

Plaintiff at Law and recd Judgment accordingly. This is a Power the Ct of Equity dont possess. Why? The reason is not given in the books. But there is a very substantial reason which may be given for it. The party compellable to disclose, might be greatly injured by a positive rule of Law. In Chancery this cant be done. Chancery has no jurisdiction over Crimes & matters, and sometimes in a Ct of Law a discovery might work a forfeiture and therefore it has been a standing rule in Equity that if the discovery will work a forfeiture the Chancellor never enjoins the party, and all others not to sue or take advantage of the forfeiture and will compel them to enter this promise on record. This compulsive disclosure is called giving by Oath. And the party may be compelled to make a disclosure of all the facts within his knowledge. From this power of compulsive discovery the Ct of Chancery

3 Bl. Comm 381. 437. 447.

Powers of Chancery.

has obtained a concurrent Jurisdiction in matters of Fact: of administration: and distribution of Personal Partnership affairs generally: and in many cases of Land. — wherein Bailiffs or receivers are sued. — — —

2 Vern 125.
3 Do — 148.
2 Vez 277.
3 Bl Com 437
Do - 382

These are all incident to the power of discovery, and their Judgments upon the Fact is the same as of Law. — — — — — — — — — — — —

2ndly As to the mode of Trials — — — — — — — — — — —

Powers of Chancery.

in favor. Ch of Chancery may take Depositions previously taken at Law "de bene esse" taken by permission to perpetuate testimony. Thus Depositions thus taken may be used in a Ct of Law. and Chancery will enjoin the opposite party not to object to them in consequence of this power. Chancery may exercise a jurisdiction over the subject itself which a Ct of Law could not do if the Witness might be called before them. Stil Land 130 3 Bl. Com. 382.

3rd Mode of Relief.

Chancery in most cases grants specific relief as if executory agreements for the sale or purchase of Land. are made. Chancery will decree a specific performance. A Ct of Law. could here only give damages for the breach of the agreement. which might be very inadequate. Indeed in many cases Chancery assumes Jurisdiction for this very purpose of affording a more specific relief or remedy. than can be had at Law. In intricate cases and assumes concurrent Jurisdiction

Eq. Cas. Ab. 177
2 Vern. 446
1 Eq. Ca. Ab. 278
3 Bl. Com. 438
1 Ves. Com. 215
1 Eq. Ca. Ab. 1
1 Ves. Sr. 413
1 Ves. Com. 532.

Power of Chancery

So for Waste the Law gives Damages and the Statute of Gloucester the Place wasted. But Chancery issues an Injunction to prevent Waste

So Specific relief is meant that which restores the Party in his rights as they were before they were violated So when Chancery interferes to prevent the effects of Fraud in a fraudulent Contract. It affords Specific relief by vacating the Contract wholly or as much as is unjust or requires what Courts of Law will compel a performance and afterwards give the person injured damages in an action on the Case for damages — So that Law requires two Suits when Chancery does but one. Chancery prevents the evil but Law punishes it. of which the former is surely the better mode of proceeding. —

3 Bl Com 438.
1 Vern 303.

In many cases Chancery will decree for that very purpose. — In some cases in Law tho Same the remedy is also Specific as in Ejectments and sometimes in Detinue. —

Thus I have summarily gone through

Courts of Chancery.

The three particulars in which a Court of Chancery differs from a Ct of Law "viz" in the Mode of Proof Trial & Relief, "But they differ in other respects and to these it is more difficult to explain the boundaries than of the before mentioned. The different rights in which Cts of Law and Equity, view a penal Bond, gives to the latter a great jurisdiction. — In a Ct of Law the whole penalty is and must of necessity be recovered on the breach of such Bond. But in Equity the penalty will not always be given for the Chancellor will look into the question and if he sees that the damages are not equal to the penalty he will chancery down the Bond and decree what is really due. In Law the penalty is considered as a debt. But in Equity merely as a security for a debt — Hence it may be said that a different construction will be put on the whole instrument than that

Powers of Chancery.

which could be done in a Court of Law. Fines and to do Cts of Law but a different Construction on the Instrument and in some a penalty is not considered as Law and debt as rather a penalty Bond is given as a security of a debt and not for the performance of the condition. A Ct of Law if the Fact was for a long time will give not only the Bond but the interest. Time they consider it as evidence of the Debt. ——

It cant then be said that the two Cts differ in the construction of their Bonds any more than it can be said that Cts of Law differ from themselves in the construction of different instruments where the penalty is the same and the consideration the same ——————

3 Bl. Com. 434. 439.

By this ground Cts of Chancery have obtained a very extensive and almost absolute Jurisdiction over Mortgages. The condition here is in the nature of a penalty

S

Powers of Chancery

and is taken notice of by Cts of Chancery in the same manner as a penalty in a Penal Cond. In a Ct of Law the interest of the Mortgagor is gone forever unless he pays at the time stipulated. — In Chancery it is different. This Court has created an Equity of Redemption unknown for 100 yrs past at Law. — Here it may be said that there is a difference of Construction in the two Courts. although it is a general rule that the construction of the instrument should be the same in both Cts. yet the construction may be different in the different Cts. (i.e. of Law and Equity) as well as in the two different Cts. of Law. — But as before observed this Equity of Redemption is for some purposes considered in Law. so far that when it exists they will consider it as such a freehold interest as confers a settlement and gives the person entitled to it a right of voting.

Powers of Chancery

for mere purposes of Entertainment. The objection is no more applicable here than to a wife. The rule is a distinct rule of construction in the same instrument for different purposes. —

"A technical Trust" or use in Land &c. or real Estate as contradistinguished from a legal interest or estate, affords an extensive jurisdiction to English Ct. of Chancery. But not so much in Connecticut. Trust Estates are little known here. — A trust estate is one where the legal title is in one, and the beneficial title or interest is in another. — For ordinary purposes a Ct of Law will not take notice of Cestuy que trusts (sic) but will hold the estate to the use of him who has the legal title. Thus a Ct of Law take notice of legal titles only, but Cts of Chancery of Equitable titles. In a Ct of Law a legal title must govern. Yet where an Estate is given to one for the use

Powers of Chancery.

and Equities. Then ought to be a remedy for him who has the Beneficial Estate. A Court of Chancery has the power to give that remedy. 3 Bl. Comm. 439 1 P. Williams 645. 668.

Mitford in his Pleadings in Chancery has endeavoured to give a general description of those Powers, which are not comprised in the three divisions of Blackstone. After observing with Mr. Blackstone that a Court of Chancery acquires its Jurisdiction by the different mode of administering Justice. 1st He says. That Ch. Ct. has a power to compel Justice when positive Law is silent, and when without the interposition of Ch. Ct. Justice could not be done.

2nd A Court of Ch. Ct. may also relieve and supply the defects of the Common Law, yet he explains that this incorrectly. But to do these things by avoiding collateral mischief the consequence is nothing more than giving efficacy to the spirit of the Common Law.

And

Powers of Chancery.

— And Courts of Equity have a right to judge according to the Spirit of the Law. Yet he says if the unjust consequences of a rule of Law are obvious and if the rule seems designed for the case to which it literally extends; and if the consequences must have been foreseen at the time of the making of the rule. Chancery can't interpose and prevent the consequences of the rule. To give an Example of both.

1st Injunctions to stay Waste. —

The Com. Law provides no preventive remedy. Suppose then a tenant for life commits waste. A court of Law can only give damages after the fact is committed. But if there is an evident intention on the part of the tenants to commit waste a Ct of Chy will issue an Injunction to prevent him from committing Waste. —

2nd It is a general rule of Com. Law that all contracts entered into between —

Powers of Chancery.

Husband and Wife before marriage shall be void on an intermarriage. but it seems said that the Contract entered into for the performance of the marriage should be void by the marriage. but the case is hardly as a marriage in England without a marriage settlement, and a Ct of Ch^y will enforce such marriage settlement. the Com Law rule to the contrary notwithstanding. ——

A Ct of Equity does not act thus decide according to the strict rule of the rule. and all the decisions go to shew that they can be enforced in a Ct of Equity. these distinctions embrace all the well defined grounds of the jurisdiction of a Ct of Chancery, which come under the particular mentioned by Blackstone under the head of Relief and consist in decreeing specific performance of executory agreements. This power is very ancient & Ct has been exercised ever since the accession of Edward 4th However it met with much opposition in the reign of James 1st

13 Eliz Com 441
2 Atk 97
2 Vern 396.
M. & S. 193
2 Ves. 480
1 Sch & L 132
8 Geo. c. 3.
2 P. Wms 243.
Geo. 6 551
1 Swan 18.

3 Bl Com 439
/

Court of Chancery

Cro. Eliz. 531
1 Jon. 424
1 Ch. Ca. 30.
Lech 172.

There was a Bill in Chancery between the City of Exon and County, the former of which had no power to demise without confirmation and that the latter were relieved at Law in damages but the Chancellor stood his ground and finally obtained a compleat Victory, tho' it was not at that time pursuant to any Act but became so in the reign of Chas. II. By Statute for confirmation of Leases, agreements &c. it enacts that the things intended to be done shall be specifically performed ——

There has been a question made whether such marriage settlements shall be enforced when they were in the nature of penal bonds? but it is now settled that if the parties execute a bond to settle one either penalty or estate either in fee or during coverture that bond shall be specifically enforced as an agreement by a decree of Chancery ——————

Equity Cases

Set out in the Lord's an execution was
made to stop Waste committed & was com-
plained of The object of it was to secure
a Statement for the Ld to decree
it in any other way than in execution as com-
ments would be to defeat the object and
Equity adopts to the substantive object
Formerly the idea was that the Ld must
be avoided at all events with the good
note now amended as to this difficulty
It was made with condition that such
& such things shall be done & the cop-
veyance ended. It is good at Com. Law. but
the things are to be done during coverture
it is good at Law because the Wife can't
sue the Husband at Law. In the fore-
mer case the suit of the Husband will
be compelled to do the thing his agreed to
covenanted to do.

Against this a clear Rule of Com. Law
that an agreement made between Hus-
band and Wife during coverture is void

15 Ed. 4 fo 43
22 Ass. pm 243
Litt. 97
1 Roll. Ab. 316.

Hobart 216.
Salk. 3251
3 Atk. 381
2 Ves. 515
2 Wms. 442.3

Powers of Chancery

and do not generally bind in Chancery

that do not amount to a Trust be enforced

in the Court of Chancery

Agreements such as are made

before marriage may be thus enforced

in Chancery without the intervention

of Trustees. The husband is the trustee of the

wife's property for the legal title for him and

he has the beneficial interest.

The power of Chancery interfering in

this case is the ordinary one of the

original Court. the mode of enforcing the

decree founded in the power of enforcing

specific performance. and it is to be observed

that the Court of Chancery will enforced

such an agreement between Husband &

wife. the latter may dispose of the property

as if she were a "feme sole". Even the

Court may make a contract concerning property

which is to be settled on the wife

but if on a "feme sole" according to Equity

though the contract according to Com. Law

1st Ch. 31
4 Ves. 118.
1 Sim & St. 94
3 Mad. 142
1 Do 70
7 Ves. 308

Eq. Ca. Abr. 444
9 Ves. 141
Do 335
1 Atk. 446
1 Vern. 112

Court of Chancery

"It has been decided in Court that such
a Contract made between husband and
wife can be enforced in Equity ——
"I have observed that an agreement be-
tween husband and wife was sometimes
enforced in Eq^y notwithstanding the Com.
Law rule that such agreements are void
and that the foundation of that part of the
right to enforce a Trust to be observed
seems to be that it will not generally
force such contract where the enforcing it
would be prejudicial to the creditor.
And if there is no concealment and any
appearance of fraud it will not be good
against creditors or bona fide purchasers
even in Eq^y But want of consideration
is no more considered conclusive proof of fraud
in this case than any other. tis not suf-
ficient to evidence of fraud per se: How-
ever in Eq^y voluntary will not support a deed
there must be some appearance of fraud
"It is not necessary for me to recite
all the Cases of fraud.

10 Ves 221

* Contra
1 Vern 405. 357.

1 Vern 94
3 P. Wms 30
Do 399
Vern 408
1 Atk 152

Power of Chancellor

However if the Husband is at the time of the settlement insolvent or in debt if there is a power of revocation in the Contract it is to settle the whole or a great part of the Husband's Estate on the wife tho' not to gadget of Land. Yet if he is not greatly in debt and makes a Contract to settle a jointure or a family settlement without any gadget of Land tho' it afterwards become greatly in debt the Chancellor will not set it aside in favour of Creditors or subsequent purchasers But with any or all these circumstances except the contract a voluntary Gift in favour of the Husband or his representatives If we have no consideration but that it was voluntary or that it was done to defraud Creditors. Tho' a voluntary conveyance is presumptive evidence of fraud, yet it may be rebutted. —— It appears from many examples that the Court adheres to the substantial effect of such Contracts and gives effect to

1 Ves 1202-
3 Atk 82.
Dr 87 c.
Bulst 218.

1 Ves 11 -
17 Ves 5.132.

Trover & Chancery.

from doing that to which it is bound and that is done without any regard to the particular form of the Contract. Thus in the case with a bond given to convey the conveyance of land, the Ct of Chy will always compel the obligor to convey the land, although there is no stipulation or contract express to do so, merely because it is considered in the nature of a specific performance and therefore bound & is considered as an executory agreement. ——————

If one of two joint obligors, bound the whole debt, or a sum at the earliest day, takes an assignment of the bond or brings the action against the obligor in the name of the obligee, the will order the obligor not to plead that the obligee is paid or that he has set off damages. But if he plead the release and the obligee replies fraud, the will order the obligor to bring the money into Court & grant an injunction to prevent the obligee from pleading judgment or release at Law

Court of Chancery.

1 Paul 2 a 31 3. 6. 1 Ves. 27 1-4 2 Ves. 27 1-4 3 Ves. 428 on 3 Atkyns. 701 Bro. C. C. 164 8 Ves. 100.

or the Court. In that case the Ct. of Ch.y will be applied to enforce the assumpsit implied by Law from the fact, as the ground of the suit the whole or the ground of an equitable contract. ——

"In Court" there would be no necessity for a Bill in Ch.y in such case for an action of "Indebitatus Assumpsit" would lie for money paid and expended and for one "Debt" in the Courts. It would seem that this action would lie in England. And if the person had paid the whole as surety this action would lie for money paid for his use. (Post 311) use. But since there is no Bill to bond in the case first mentioned an action of "Indebitatus assumpsit" will not lie ——

1 Ves. Cont. 311

"With regard to the equitable cases in which a Ct of Ch.y will interpose the common rule that equitable interposition extends to all cases where the subject of the contract or the parties are within the jurisdiction of the Ct. As the rule extends in the Courts of Law it is immaterial.

Powers of Chancery

For it can't mean that wherever the subject or the parties are within the jurisdiction of the Ct. it was afford relief, if so it would have cognizance of all cases that Cts of Law would. But it certainly has no such cognizance. The Rule means that when the matter in dispute is of such a nature as to require the interposition of Chy that Ct. will take cognizance of it if the parties be found or the subject matter be such as is within the jurisdiction of the Ct. The rule then in the books should have been expressed in the negative. That Chy will not interpose when the subject or parties are not within the jurisdiction of the Court. Thus in England A covenants to convey Lands to B and leaves the Kingdom. This is such a Contract as requires the interposition of a Ct. of Chy for that cannot a specific performance of a Contract: But then is not in the rule for though the party may be

Powers of Chancery,

in the United States, the subject is within the jurisdiction of the C.C: it acts here "in rem". So if it in England agree to convey Land in the United States to B. the C. may enforce this Decree & acts "in personam" at once as "in rem" ——— ———

"By Process of Contempt and Sequestration of Goods and Lands the C. of Ch. enforced a Specific performance in the Case of Ld Baltimore and Governor Penn. on the Boundaries of Pennsylvania. ——

7 Vesey 444
17 Ves. 264
444. 454

There are several cases on this Subject. in Equity matters & personal subjects are within the jurisdiction of Ch. it can interpose as the nature of the case may be. ——— ———

"Formerly it was held that Ch. could not act "in rem". it could not specifically enforce its own decrees, and that it could act "in personam" only. It has been long settled however that Ch. could

Court of Chancery

act "in rem" by issuing process to put the parties in possession of the Land with the Local Limits. by injunction or writ of assistance to the Plaintiff as well as "in personam". Since the Old opinion was held that they could not act on the subject matter of the contract. it would have been nugatory. for the Ct to have made a decree respecting the sale of Lands this practice of acting "in rem" began in the reign of James 1st.

1 Ves. 131 on 91
3 Atk. 275
Ib. 387
1 Do 541.
1 Vern 84. 454

"in Short to consider the Original Ground on which a Court of Equity interposes but I have not considered the particular cases under that general description but will instance. Generally Courts of Law will decree a specific performance of agreements properly falling within their Jurisdiction in their own and there only where Ct of Law will give damages for the non performance of the agreement. On the contrary they will not decree a specific performance when the Ct

Powers of Chancery.

If Equity will not give damages although it may have within its jurisdiction — it will not decree a specific performance of contract, because a Ct of Law will give damages for its non performance: it must fully & duly within its jurisdiction —

2 Vern 446
1 Ventr 189
2 P. Wms 284
Cowper 446
1 Ves Sen 227

Hence arises the reason of this distinction, or is there none? — I think there is an obvious one: which may be learnt from what has been said — The decree for specific performance is generally only in aid to that remedy granted by or in other

This power is peculiarly exercised for the purpose of giving a more complete and adequate remedy. The principle in the two Cts is generally the same though the two different modes of proceeding. In pursuance of this they (i.e. Chs) will not enforce voluntary agreements except in the case of Husband and Wife, Trustees for the breach of such voluntary Contract or agreement Eq. Equity will not give damages upon though such voluntary Contract be under Seal.

1 Vern 341
So — 242
1 Atk 10
1 Vern 450
So — 74

Powers of Chancery.

For Chy will not raise a right where the contract does not raise one and such a voluntary agreement is a "nudum pactum" in Eng. But there are exceptions to both sides of the rule. A specific performance will not always be decreed in Chy though it will if Eq would give damages for the non performance of the agreement: Thus suppose a Vendor enters into an executory agreement for the conveyance of Land & then comes to find out a circumstance which renders his title bad & incapable of being made good. Chy will not decree a specific performance for it would be unjust towards the purchaser who has paid a valuable consideration and was ignorant of the executory agreement. For it would be no injustice to a "bona fide" purchaser who had notice of such agreement but as between parties a Eque injuria) and against the other party it is voluntary as it has become void & title in the eyes of Chy & the agreement should be specifically performed.

Court of Chancery.

by a Ct of Equity will give dower and the creditors of a husband is entitled to dower in Eq. Equity is the same on both and it is a rule that where Equity is equally strong shall always prevail. Such an agreement to convey on a valuable consideration at law will bind the subject as against an intervening Judgment creditor. Quere if the consideration of the agreement is over inadequate because they have not a Lien upon it: tis a general Lien on maintenance upon the land, but the executory agreement is a similar "lien" and shall have the priority.

1 Fonb. 339
1 Powell 14
282. 279. +

1 Powell 282

— This is different from a direct conveyance to a third person. So also where a Bill is to compel a defendant to accept a conveyance and for the consideration money. Ct will not compel a specific performance when the Title of the Plaintiff is under encumbrance

Power of Chancery

not immediately removeable: the damages may be recovd at Law. It would be inequitable to deny a Specific Performance. and yet avoiding to the rigid rules of Law the mutual damages for the non performance

1 T.R. 1ère 173
4 D.&E. 201
2 Bos.&P. 34

If one person demand to convey land to another which actually belongs to a third person Chancery will decree both a Specific Performance of the Contract and damages in such case will be recovered at Law.

1 Bos.&P. 101

I have observed that Chancery will decree a Specific Performance of agreements falling under its own Jurisdiction when damages would be given at Law. to this rule I have mentioned some exceptions. Here are also exceptions to the contrary Rule viz. that Chancery will sometimes enforce a Specific Performance when no damages would be given at Law. (Eg.) In the case of Lord

Powers of Chancery

before marriage to convey lands of the
Covenantee. Now in Eq. this bond is de-
clared by the marriage and Cannot
then be damaged: but they will
enable by a Specific performance of the
articles a feme sole made before mar-
riage to convey Lands to be vested
in husband damages could not be given
at L. Law for a breach of the Contract —
but they compelled a Specific performance
and the Decree is obvious.
It is plainly impossible that a Civil
action should lie between husband and
wife — A merger in a Ct of Law
it — Ecclesiastical — and Ecclesiastical an Equation
might issue against the Specific per-
formance. But in both Cts a decree finds the both
in fact only: the law not knowing the Ct
Equity will effect the decree the same
all in rem, and the it found only to the
extent of the property Granted the and
Equity under the deed are Bargain and
Sale. The Contract is considered as binding

2 Powell 10.
2 Vo. 254.
2 Peere 243

Power of Chancery

as to the subject only, and the extent of it in a Court of Eq. And even if in the case the trust was an infant child moved done and trust in performance (provided the conveyance was with consent of the Guardian or parent, and on good consideration. ——————

1 Fonbl. 68
3 Atk. 607
2 Ves. 244

Another instance of this kind is when one binds money to an infant to purchase necessaries: Now in favr of this money, is not to be refunded by the Infant, because this privilege is not to be destroyed. But in this case the Infant would be only obliged to refund so much as was laid out in necessaries. and therefore there is no danger that this privilege will be infringed upon. ——

In Chy the bond is considered as the deed of necessaries. complete justice is done when to the Infant. and yet he is subjected. This is a case in which relief is not specific. ——— pro.

1 Fonbl. 68
2 Powell 258.
5 Mod 363
1 Peere 558.

Court of Chancery

To ascertain the agreement is made under the Act of 1st Geo. 4 c. 87. that Court would enforce the Contract though a Court of Law would give no damages

Let in Case of a Judicial Sale of an Estate in Ireland. The Purchaser indeed acts for himself but the seller acts for the Estate therefore a Judicial Proceeding and a Court of Common Law can't interfere because it never interferes in the Judicial Proceedings of Chancery or any other independent Court. It is common for the Chancellor to order the to sell of Estates and in encumbrances so as to give effect to the decree. This Sale is called a Judicial Sale

2 Vern. 14

Further when the condition of a bond is extinguished or the binding force of the Contract is destroyed at Law by the obligor becoming Executor to the obligee Ch. will enforce the Contract in favour of those who have legal claims upon the obligor

Powell & Thaneu.

A Covenant cannot be enforced at Law
when A covenants a Cond to B who dies
making A his Executor. At Law that
obligation is extinguished because it cannot
be enforced. The reason is that the same
person would necessarily be both Plaintiff
and Defendant, and a man cannot sue
himself; and no man can in this case
sue A but himself as Executor, & he cannot
sue as Executor because he is not to the Cond
ition to pay the money to the Cond
itor as Executor but as Obligee for he is bound
as their testator and & he having covenant
-ed with Testr. during coverture

Mr. Statute of distinctions

when Plt will or will not do an act
performance of which damages would not be
recovered at Law, which is the Pl's object, there
is a good argument in substance but one
which is insufficient at Law by reason of
some formal defect. Plt. during coverture
specific performance, Plt. can sue the
Husband. Feme Sole & married

9 Mod 37
10 Sv - 515

Recueil Criminel

But it may be objected by the words "feloniously" as well as by the words "of malice prepense" that the Statute 1 Edw. VI. Ch. 12 gives no relief to Husband convicted of killing his wife on the death of his mother and becoming entitled to her personal estate by her decease. To which it may be answered that perhaps this distinction is a subtle one though the Statute plainly conveys the idea intended. By formal default is not meant the mere default of the Accused but of the means of influencing default in the King's Bench where cases of misdemeanor are tried as formal defaults. This is not a thing language with which I am familiar but I have observed that Ch. Jus. Eyre generally grants a Writ of Performance upon the default of the Sheriff in his Jurisdiction. Qu. it is to be observed that if the damages given at Nisi prius should be inadequate to the injury the Ch. Jus. Eyre will not generally grant

D. Bro. Ch. 111
1 Ves. sen. 243
3. Atk. 607

Powers of Chancery

Where Law will not [illegible] the jurisdiction of the Ch. If an adequate remedy can be had at Law. That no reflection for going to Ch. And it is not necessary to allege in the Bill in Ch. that adequate remedy cannot be had at Law. See the Bill is demurrable. But if any to the Contract is in ill nature & that adequate remedy might be had in Equity and be sued. Ch. jurisdiction stands. It appears that at Law cannot give an adequate remedy. Ch. will interpose whatever the nature of the Contract may be.

1st. c. 28
2d. 139
1 Bl. Ch. 341

If there are certain cases in which Ch. will interpose of course because such cannot be had at Law. There are others where the nature of the Contract being such that Law cannot give adequate remedy Chancery interposes. Hence it acquires a jurisdiction collaterally. Where therefore the said that Ch. will not -

Equity of Redemption

intolerable delay may be had. Equity will not grant relief if it is settled that the jurisdiction is undue according to the circumstances of the Case ——

Another general Rule is that Equity will not usually decree a specific performance of a Contract concerning personal Estate because in that case Law can give adequate remedy. The damages given at Law usually an adequate relief and therefore damages are not to be awarded by the Chancellor Concurrent. Mortgage Contracts for money due is no necessity for going to Equity ——

But this is not an unqualified Rule but must be regulated by the particular circumstances of each Case and qualified by the exceptions that have been engrafted upon it. Where plainly requires a specific performance. Where Law is deficient Equity will relieve personal property if the Party will do it.

18 Ves 15 - 1 Co
13 Ves Jr 570
17 Ves Jr 447

Trin. Term

The Presumption is that the immovables are an adequate relief for a Creditor's Contract but this presumption may be rebutted and a Specialty proved required.

Where the Defendant to an Action of Debt by Bill pleads specially matter which if true would be a Defence at Law, but which the Plaintiff avers to be false, and issue is joined thereon, this is a Confession of the Debt, and the Plaintiff is entitled to Judgment, without proving the Bill.

Where the Defendant to an Action of Debt by Bill pleads specially matter which if true would be a Defence at Law, but which the Plaintiff avers to be false, and issue is joined thereon, this is a Confession of the Debt, and the Plaintiff is entitled to Judgment, without proving the Bill.

2 Bos & Pul. 217
18 Ves. 394
3 Mod. 383
1 Vern. 189.

Where there was an agreement on the one side to sell and on the other to buy 800 Tons of Iron and payments were to be made at different instalments. Here there might be many actions brought.

Powell v Thanscom.

3 Atk 383
1 Ves: 201

A Plea and Answer that will divert a Performance by a Trust that is prevented Subject to the Credit of the Purchaser de Jure on the Fulfillment of the Contract on Principles of Equity Exceptions to the General Rule. Where the Contract without Personal Insolvency that Ct will not decree S.E. if Plaintiff paid it mixed with the damages. Here Ct will decree Specific Performance at the Hearing on Action at Law against B. for breach of Covenant. Bill for Injunction against A in Ct. Because the Contract was fraudulent: now as B has brought it home into Ct. It may file his cross Bill and pray relief. Here Ct if they find no fraud may decree relief. In this case damages might have been given

1 Bacr. 69
D° 520.
2 Pow: 216

And tho a Bill brought on a Contract of a personal nature, the Defendant does not demur on the ground that relief ought not to be had in Chancery. but

Power of Chancery.

Gilb. Eq. 227 filed an answer. Ch. will decree Examinate to doing the Deft. upon a receipt to the objection and jurisdiction is admitted.

2 Powell 219 "On the other hand in the arguments upon
1 Vern. 282 interests in Lands or Stipulations for
3 Bac. 526.
1 Ford. 278 in Specie to be done Ch. upon equity de-
Do — 369 cree a Specific performance. Damages at Law are not of course an adequate remedy

A voluntary Agreement of this kind will not however be enforced in equity. In fact the rule must be understood with the qualifications below mentioned. If A that enters into articles of agreement with B. by which he contracts to convey a Farm. to him upon sufficient consideration within a limited time and afterward refuses B may compel him to do it (i.e.) to convey a legal Title to him by a Bill filed in Ch.

2 Powell 219 Also that B could do at Law. would be to recover damages which might not be an adequate compensation or remedy.

And when the Equity is on one side and the personality on the other. Ch. will decree a Specific performance by a Bill filed by the other. 2 Powell 219 and this is just and equitable.

"The same Court ought to be open to both and the remedy ought to be mutual: But "in Contract or agreement to be binding, on neither to entitle the party to a Specific

Performance

Powers of Chancery

performance in Ch^y will be specific or particular relief. And hence a general covenant to convey Lands will not be specifically enforced in Ch^y

The intended Seller is trustee to the intended buyer, and therefore the latter has a lien up on the Lands. But in the case just now stated he has no lien upon the Lands, because they are not specified. He has no equitable title more than a legacy can in Lands not specified in a Deed: in fact the lien must be an equitable lien. I have been endeavouring to inform you what Contracts and what circumstances Ch^y will enforce a specific performance of specific Contracts.

Further as a Genl Rule he who demands Equity must do Equity i.e. he who demands a specific performance of a Contract must shew that he is ready and willing to perform his part of what he has promised &c.

In a Ct of Law there are what are called conditions precedent and conditions subsequent. Now in Law when the plaintiff's right of action is to accrue by any act of his own he must ever perform or what is equivalent or what is equivalent. But in Ch^y he who seeks a specific performance of a Contract must shew that he has performed his part or its equivalent.

1 Ves^r 335
1 Bro^n 450.

Court of Chancery.

In what case bond there where the condition is founded or where he is not bound to do certain things before remedy can be had in his favour or against the other party.

Thus A. contracts to convey land to B who contracts to pay him for it. Now in Law A may sue B or B. A. without averring performance - but in this case Ct. of Law will not decree specific performance unless there is such an agreement or something equivalent to it.

This difference is not founded on a different construction in the two Cts: but in this the remedy at Law is "strictu juris" A Ct of Law must interpret when such a contract is taken "cum debita justitiae" - But the Chancellor 15 Ves. 383
17 Ves. 87
2 P. Wms. 170
Salk. 171
interprets not at his discretion: the party must do Equity when he can have it.

Another branch of this Rule is that the party praying a Ct in Ch. had done what he was bound to do - but is prevented by subsequent events from performing the residue in case of law a sue against the other party. Thus sue A agreed to pay B. 1000£ within two months only upon Consideration that he would marry his Daughter and settle a fortune on her: B married her and she died before the time expired. Now under B brought a bill in Ch. to recover the money of the Father but

Ch. 4

Court of Chancery.

Ch.L. would not intertain and dismissed the Bill
The Plaintiff was committed to act he would have
performed. Time he was prevented from doing the
Thing from on the act of God. But it was a
condition which did him no injury &c.
And of another case of this nature. ——
In this case a marriage agreement was entered
into between Lord Cardigan and his Father
in Law. The agreed to settle on his Wife a man-
or and for the Part of this Lord in law
law other provisions. He settled the Manor
but before he made the provisions he died
without issue. His Wife brought a Bill in
Ch.L. to recover the 300£ per annum. The sum men-
tioned in the agreement. But the Ch.L dismissed
the Bill as he had not done all he agreed to do.
and although he was guilty of no blame he was
no further by what he had done.

1 Ver. 447. 385.
Do 95.
Ch. Ca. 188.

2 Vern. Ch. 448.
1 Freeman 35.
Skinner 28.

This Court Rule however is not without qualifi-
cations and exceptions. e.g. Where the Plaintiff
performed in part and time, in no fault for the
non-performance of the residue is not in statu quo
it is true by non-performance of part is not the mean
be a fulfilment by reason of that part performance
unless he has done all which was not the case
with the parties in the above instances. ——
Thus also where there was an agreement be-
tween the Knights and owners of a Ship and

Exchequer & Chancery.

it was stipulated that there should be a Trust only on the homeward bound Voyage. It appeared that there were no Goods of the Freighters at the place specified. Therefore a Bill was filed against the Freighters and a decree framed in favour of the owners for them had performed a part of what they had promised. They had been at the expence of going to the Gold. and if therefore they could have subjected the Freighters they would not have been in statu quo."

2 Ch. Ca. 21
1 Eq. Ca. Ab. 79.
1 Vern. 385
1 Vern. 2 Ed. 117
Prec. Ch. 312
Gilb. Rep. 120.

To proceed on a Gen. Rule. That he who seeks Equity must shew that he has Law Equity or what is equivalent to it. Therefore suppressing to perform is equivalent to an actual performance of the agreement on his part and this Rule holds in Law and Equity. When the Party putting relief has been ready to perform and the other Party would not and by suppressing and has prevented him from performing Ch. will decree in his favour.

Salk. 110.
Hob. 88.
2 Bac. Ab. 1312
4 T. Rep. 404
n. 401.

A. Ch. of Ch. will not decree a Trust in Exchequer where agreement stands not been discharged by Parol. By a Gen. Rule that Parol Evidence is admissible for the purpose of rebutting an Equity and this even at Law. This Rule is peculiar to Equity. But a Parol release will not discharge a Deed in Ch. The Chancellor has a right to inspect

by

Court of Chancery.

by reason of his extraordinary Jurisdiction discretionally and on this ground it is that Parol Testimony is admissible for the purpose of repelling an Equity. But in case of a Bond for the Court does not controul the Deed the Testimony is introduced to inform the Chancellors Conscience when the Party requiring Specific Performance has discharged his right to Equity by a Parol discharge. The Chancellor on finding it to be the case truly refuses to interfere and leaves the Bond just as it was before the Bond is not discharged for a recovery may be had at Law. Parol discharge to the contrary notwithstanding. Thus if at common Law under Seal to convey Land to Bindy months. B discharges him by Parol and afterward brings a Bill in Equity to compel him to Performance. Here the Parol discharge may be introduced to rebut the Equity - it shews "in foro Conscientiae" that he ought not to be bound or that he is discharged. ——

Again "Where a Party by Equity claims a Specific Performance of an agreement which he has suffered to lie for many years without insisting upon it, he is not entitled to a decree for Performance unless the delay is satisfactorily explained by special circumstances." Because it is presumed he has waived

his

15 Ves Jun 384
17 Ves Jun 240
2 Atk 68
Dc — 220
1 Bro Parl 40
1 Bro Ch 201
Dc — 288
2 Vern 299

Power of Chancery.

2 Ves. jr. 82
2 Vern 275
Do 484
2 Ves. 200
1 Ves. & B. 321
2 Atk. 610

his right. In these questions can be no prejudice. Ct will raise this presumption. But it cant on this ground vacate the agreement. A different case is put and Ct not a different Construction.

But Circumstances of this kind must be explained by circumstances which shall rebut the presumption. But no length of time will prevent Ct relieving against Fraud.

In General no great injury is done by Ct not decreeing a specific performance because a Ct of Law will give damages. But in case of Fraud this is not true. Then can be no pecuniary recompence for no man will be presumed to have acquiesced in a Fraud.

1 Ves. jr. 322.

I have said that the rules of this Equity must be Equity. It is to be observed however that the Pltf must apply to be put in possession at the time specified does not take away from Ct claiming a power in Ct. and the reason is said to be that if the Rule were otherwise this relief would be seldom given.

1 Atk. 451 12
4 Bro. C.C. 329
1 Cox 423. 2.

It is said by Lord Eldon enough if the Rule is altered that Ct will require more punctuality than formerly.

A Ct of Ch. will exercise its discretion as a Gen Rule that if the Bill is not satisfied shall shew any Countenance on his part in

Endeavours

Court of Chancery.

Performing he has generally no Favour from the Court especially if there is any alteration in the circumstances so that the other party may in any way be injured. The Rule laid down is, if he has trifled with the performance of his part, - but you may see the great difference, that it lies for the Chancellor to exercise.

But with respect to the Plff performing his part, that he may obtain a decree against the other party there is a great difference between Marriage Settlement agreements and Wills. - The Gen[l] Rule that the Plff must have performed his part or done what is equivalent to it, does not apply here. The Wife in Gen[l] an incumbrancer and in this favour a Ct of Ch[y] will compel a party to perform his part although the other has failed to do his. Thus A Contracts to settle property on B his intended Wife and her issue B dies the same with respect to him and his Son Now B dies without performing what she covenanted to do. The Children claim a specific performance of this Covenant from the Father in Ch[y]. The reason is that the Children are in no fault for the non performance of the Mother. They are as meritorious Purchasers as the Mother. Ordinarily the Plff requiring a decree in his favour must have performed his duty.

2 Bro. Ch[y] 260
2 Ves[n] 528 n
Do 538.
13 Bro. P.C. 27.

Wills.

Powers of Chancery.

will arrest that you have not done your duty. But in this case they Children were not compellable to do any thing. They were not bound to perform what their Mother covenants to do. and therefore they have a remedy. The Rule is precisely the same as respects the wife if she be not a party. Thus suppose the parents are the Contractors and the Covenantees the Husband also a party and the wife not. now if the Wife's Father dies without having performed his part. or perhaps he is insolvent the wife in such a Case shall have a remedy against the Husband in Ch^y who may decree a specific Performance against the Husband. — All she had to do to entitle her to this remedy was to marry. — —

Fon Ch^y 445
1 Vernon 377.
2 Vern^s — 66

In pursuance of the subject of the Powers of Ch^y to enforce a specific Performance of Contracts I would observe that all executory agreements are entered into a Statute Staples. and unless a complete performance is impossible. here a Ct of Ch^y may decree a partial performance if the party requires it and if it can be done consistently with the Statute.

3 Bro. Ch^y 339.
1 Ves^r Junr 260
Do — 211
2 Powell — 31.

Thus where a Lease was made by a Corporation for 40 years and a Statute was afterwards made for limiting Leases for longer terms than

10 yrs —

Powers of Chancery

10 years. Ch^r^ decreed this Lease good for 10 years
This enjoining that it called the as near
as may be. In this Case a Ct of Law would
not do it if the party should sue at Law for
the non performance. it would have been a
good defence for the Defendant to have pleaded
that the performance was now unlawful.
and as a Ct of Equity can only direct a Contract
it must therefore have given a judgment
for the Defendant. His same Rule holds
where the performance is rendered impossible
by accident or the act of God.

Thus A covenants to convey to B a Grove
of Standing timber and before the grant is
actually made a Tempest blows down one
half of it. Here a Ct of Eq^y^ will compel
A to convey the residue. and in that Case they
will compel the party suing readily to pay
in proportion to the part performed. This
doctrine of apportionment is unknown by Ct of Law.
when the Contracts are executed. Thus a Ct of
Ch^r^ will decree that the Contracts is good and
shall stand. this though formerly doubted is now
settled. Thus if A empowers B to limit
certain Lands by his or B by Will with remain-
der to him in Tail and the Will should
die unpublished. and the party authorized
to limit it. it should limit it on the
Children

1 Rawle 448
Plow. 284
3 Br. Ch. 638.

2 Bl. Rep. 731
2 Ves. Jr. 254
2 Vern. Ch. 581
Do 163
1 Inst. 219
Do 352.

Exchequer & Chancery.

children it would be a good limitation at law
if a Deed were executory, Ch[y] would order it to
be enforced. This instrument Ch[y] would
decree to amount to a Lease. The Gen. Rule that a Con-
tract which is rendered impossible to be per-
formed or unlawful by Statute, is void.
But upon a fair Construction it goes no further
than to render performance unnecessary as in
a case of a Lease for forty years during so long
Selw[d] 189 or a time. The Rules will therefore strictly con-
notes 198. sistent.

When one acting under a power con-
1 Sand[rs] 212 veys a greater estate than he has a right to
n. convey, the Conveyance will be good in Ch[y] for
so much as the Deed a right to convey.
Thus A has a right to make a Lease for 100 yrs
27 Rep. 252. and he makes one for 20; this Lease is good in
Ch[y] for 100 yrs though in Law it is good for nothing.
There is a great difference to be remarked
between the Construction at L[w] of Ch[y] with put
on certain words in an Executory agreement
and the Construction given by both Law and Ch[y]
to the same words used in a Contract Executed.
The distinction extends to certain cases where
real Estates are limited. Some are strict ge-
neral and Special. Now the Rule of Equity is
that in the case of Good Cause that when one
conveys by Grant or agrees to A for life, remain-

der

Powers of Chancery.

remainder to issue of his body. A takes an Estate tail. And generally wherever an Estate is limited to one for life and remainder to his issue generally and specially the person to whom the Estate is limited takes the inheritance. This is the construction given to a Contract executed: the reasons why such a construction is given in Equity are numerous and well founded for "issue of body" are words of limitation not of purchase. Of course they can take as remainder men and if they could take they would take only a Life Estate for want of words of inheritance applied to them. ——

Vol 5th - 13

8 T Rep: 510.
1 Cattle 94
1 Ventris 320
Do - 379
7 Mod 533
5 T Rep 299
Do 320
6 T Rep. 30.
Jenne 25.

If in executory articles to convey the same words are used as if to A for life remainder to the issue of his body. Ch. will decree the covenantor to settle an Estate upon A for life and then upon his issue for life and on failure of issue on his part then to his second son and his issue &c. ——

1 Jenne 141
18 Ves 394
2 Vezey 558
23 Ves 348
23 Ves 321
17 Ves 238

There is a great difference in effect between the construction of these words in Contracts executed and executory. For in the former case he may defeat that issue by levying a fine or suffering a common recovery. But in the latter case he can't do it. For the Equity will follow the instructions of the Covenantor generally not particularly. ——

Powers of Chancery

But Ch^r will not construe the instrument to give effect to the particular intention of the Grantor or Devisor. Nay in the case of Executory devises where the Contract is executory A shall be tenant in tail and the equitable interest of the Grantor shall be followed even tho' it be probable that his Children will have it

But in Ch^r A shall be tenant only for life and the Children be defeated of the Estate and here the particular situation of the Grantor or Devisor is followed

As the Courts do not themselves in case of an executory agreement convey the Title Ch^r will do it and to give effect to the intention of them making the instrument and they will go further for if in pursuance of an executory agreement made before marriage a settlement should be actually made after the marriage Ch^r will set it aside and order another to be done and the reason is the words in a Grant after marriage have a different construction from the same words used in the executory agreement. They don't consider the agreement as performed

3 Atk. 203
Fulle Ca. 171
Prec. Ch. 356 note

But if in pursuance of such an agreement as this before marriage the settlement should be made before marriage Ch^r will not set it aside unless the settlement is suppos'd to be made

Power of Chancery.

made in pursuance of articles contained in the agreement because the parties being sui juris the Ct will presume they meant to make a new agreement. But where this presumption is done away, by the expression used in the settlement they will not set it aside.

It has been said that this Rule will obtain only in the case of male. not in favour of females.

In carrying Equitable agreements into effect it is a great leading principle that Ch^y considers that done which ought to have been done and that from the time at which the agreement was entered into, unless some other time is specified. This Rule tends to one important consideration and so much that it has been styled by "Lord Ch. the Omnipotent Rule."

Upon this ground it is that an equitable agreement becomes a specific "lien" upon the subject of the agreement; it becomes a "lien" upon the property contracted about. Hence the Vendor is considered as Trustee for B. tho' he holds the legal title. but B. may claim and have it out of his hands by making application to a Ct of Ch^y in pursuance of the great principle. Under a Construction of this Rule it is settled that if any Person entered into any articles by which he bound himself

1 Vern 123
2 Do — 34
1 Ves^r — 238
3 Atk^s 371
1 Vern 258

1 Sch & Le 359
2 Ves^r 639
1 Bro. Ch. Rep 70.

himself

Power of Chancery

himself to lay out Money in Lands or if he
paid money for that purpose and dies his
Wife shall have the money, as real Estate al-
though it was never actually laid out in Lands
2 Powell 83 It is considered as Real estate from the Articles
2 Atk. 304 entered into. It makes no matter whether it is
Salk. 154 by Will or not even if it cannot be identified
2 Vent. 330 it shall go to the Wife.
1 Eq. Abr. 175
Do. 97.

The same Rule also leads to this important
Consequence. if a Woman before marriage
had bound himself to lay out money in Lands
and the marries and dies before the has actu-
ally compleated the agreement. the Husband
shall be Tenant by Courtesy of it. and Chan-
cery will order that the Sum specified shall be
conveyed to him for Life and then to his Chil-
dren. or if he will order that he have the Pow-
ers & interest of it for Life. The reason is found-
ed on the same grounds as that by which it
was antiently decided. and it has now be-
come a Gen.l Rule of Equity.

Yet in this case if it had been the Husband
instead of the Wife, she could not have been
2 Vent. 346 tenant by Curtesy of it. In fact a Husband
Do 345 may be Tenant by the Courtesy of an Es-
tate that never could be Tenant by Dower of one

Powell 320 But as Money thus articled to be laid out
1 Vern. 172 in Land may pass by deviz as real Property

and

and on the other hand it will not be said as personal property to a Legatee. 3 Peere 221. 2 Vern 109.
And it makes no difference in Cases of this sort whether the money be identified or whether it forms a part of the General mass of his personal property. in both cases it is treated as Land. I observed above that Equity considers that as done which ought to have been done. of course when money was agreed to be laid out in Land it will be considered as laid out in Land But they wont do this unless the agreement be positive. So if A entrusts money in the hands of another to remain in his hands until it might be laid out for his Daughter. the Daughter died and it was held that the money was still personal property for there was no effectual agreement. Thus if a man should with certain money in the Publick Funds or in Land, for his Son at the election of his Son. and before he makes it he dies it will go to his Executor as personal property. 2 Vern 227. 3 Atk 256. 3 Atk 258. 1 Vern 298.

At the Rolls "Old Rule" comes. for if a man having Land agrees to sell it for money and dies it shall go to his Executor as personal property. and not to his heir as real property. This is in pursuance of the great Rule that Equity considers as done what ought to be done.

4816)

Parties & Chancery.

It follows from this General Principle that after an agreement for a sale of property such an one as Equity will enforce the Vendee under the articles shall be taken for all contingencies which shall happen to the property from the time the agreement was entered into, the Vendor being in no fault.

1 Ves[t] Jun[r] 414
2 Wms 339
Salk[d] 154.

Thus where one covenanted to convey a plantation in Jamaica and before the conveyance was made the Great Earthquake swallowed it up it was held that the intended purchaser should suffer the loss.

A made an agreement to take a lease from B. for three lives and take a conveyance for a certain time and before the time arrived one life failed. A specific performance was enforced in Ch[y] The ground is from the time the articles were entered into. The purchaser is considered as the owner and the seller as the owner of the consideration money only. There is a case in the record of Pe. Wms which Sir J. Jekyll seems to deny this doctrine. - - - - - It is mere dictum" he there refuses to decree a specific performance of the Contract because it was a matter of "moonshine" a piece of swindling.

2 Vern[r] 411
1 Do 41
Bro. Ch[y] 150
2 Pere. Wms 345.

1 Wms 437.

There is one of these cases from Duth. it would seem that this doctrine was denied. But upon examination one will find nothing in the Authorities

Conf.

Court of Chancery

"Equity considers that if the Contract is not truely a Contract of Sale but merely a Contract for future agreement with respect to the subject the Property is not changed in the Case but the consequences don't follow from it. By this is meant where one of the Parties shall have the Profits by the agreement in Preference of all others Claimants.

With regard to the rule that money intended to be laid out in Land is regularly considered as Land from the time of entering into the articles it is to be observed that if the Man intended to have the Land at last purchased is to be Tenant in fee simple of it he may at his election retain the money or have it laid out in Land.

Thus A covenants to advance 1000£ to the purchase of Land in fee simple for his Son now if the Son dies before it is laid out the Money is still the Son may have the agreements & there is no objection by the Principle Party; and if he dies before the money will go to the Executors in this case there are no third persons to be injured but in case of a Tenant for life & remainder man have a claim.

But still to take the Case out of the Rule even where he is to be benefited by the purchase who would be Tenant in fee simple he

must

must in some way or other manifest that election to consider it as money for if he does not and a contention arises between him and the Executor it shall be considered as Land —

Thus if A devises his Estate, that it shall go to his Executors in Trust and no Trust is mentioned to be in him, and it shall be sold & the devisee keeps it, as so much money advanced to buy land it will go to the legatee. So Lord Hardwicke held in a case where the testator declared that he intended that it should not be a purchase of Lands is evidence of his intention. So if the heir has waived part of the money. for that is to admit an Equity. —

His Election is confined to the Tenant in fee simple. His personal and died "Cum Personâ" as between his real and personal representatives one cant make an election in prejudice to the other. Hisome the leading distinctions on this subject. —

2 P. Wms 165
3 P.C. 221 n.
3 Atk 255
1 B. C.C. 223
1 Peere 217

I have observed that this general principle viz that property is considered as transmuted from the time of entering into the agreement only in those cases where the party will be compelled a specific performance admits of some qualifications Thus where mutuality to an agreement is a decisive objection to a decree for specific performance

Court of Chancery.

So is uncertainty in the terms of it, which would make it void at Law, though at Law more is certainly required. Thus when A agreed to sell an Estate to B for 1500£ less than to any other purchaser and B did not bind himself to take it upon a Bill for a Specific Performance it was dismissed for two reasons 1st for want of certainty 2nd for want of mutuality. B may not bound himself to take a deed &c. But if the agreement were mutually mutual, no Judgment upon which occasions want of mutuality. however Court may be will decree the Objection to a demur for a Specific Performance.

2 Powell 233
2 Vernon 415
1 Eq Ca Ab 209

This is evident from the case above cited. Where the subject of the contract (i.e.) the Jamaica Land) was wholly destroyed by

And where the agreement was to convey an Estate in consideration of an annuity and before the first instalment became due the annuitant died. They ordered the Party to convey the Estate.

2 Powell 232
1 Atk 12 and 10.
1 Ba Ca 155

And where there was an expectancy agreement for the sale of Stock at an exorbitant premium. The Stock then being very high but before the conveyance was made it fell & to pay a Specific Performance was decreed in Ch[y]. This for of the Powers of Ch[y]

Court of Chancery.

Penalties.

Obtained that Ch^rs in equity will not suffer an advantage to be taken of a penalty as they consider it as a mere means of enforcing the Contract.

From that it has been laid down as a Rule that where there is an application for a specific performance of a Contract or Covenant, the non performance of which renders a penalty, it is necessary for the Plff in the Bill to waive the penalty, else the Bill will be demurrable. To such a Bill the Deft is not bound to answer, and therefore seems to be this, that if he answered and confessed a violation of the Contract, the Plff might not go to Law and upon the confession of the Defendant in Ch^y recover the whole penalty.

1 Ves^r 602
Powel 2.64

The reason is not because it is necessary to waive the penalty, that Ch^y may not enforce it, for that they never do.

It is not universally true that Ch^y will not allow advantage to be taken of a penalty. Where the performance of a Contract may be enforced without the penalty, they will relieve against it by an injunction, if necessary, and in such a case will never enforce it. As in the case of a penal bond. Here Ch^y on payment of principle interest and costs, will order the obligee to desist from his action on the bond.

4 Burr. 2228.
2 Bro. Ch. 341
Powel 171
3 Atk^ns 520.
2 Ves^r 316.
D^o 280

Powell of Chancery.

But how does it happen that the subject of the Contract can be without Penalty? In general when a compensation can be made for the breach of a condition according to the true rule of damages the subject of the Contract can be enforced as in the latter case of a penal bond also in a mortgage. This is not considered as a pure share but only as a pledge. If the accident and the payment of the money is the principle. Since 2 Powell 26 then the object of the parties is obtained by the 50 — 52
payment of the principle interest and Costs.

I observed that Equity would not suffer advantage to be taken of the penalty, when the subject of the Contract could be enforced and the subject of the Contract could be enforced when there is a clear rule of damages.

I would further observe, that when there is no rule of damages the Ct of Ch[y] continues against a penalty. In such a case there can be any compensation according to a clear rule of damages. As when the Lessee covenants not to alienate without the Consent of the Lessor and a Penalty is annexed (viz.) a forfeiture of the Lease. Since he does alienate he 2 Mod. 112
forfeits the Lease and Ch[y] can relieve against it. Because in this case there can be no 3 Powell 205
clear rule of damages.

Yet if there is a Rule of damages and

Ex.

Court of Chancery.

by reason of intervening events no compensation can be made, as a substitute for the penalty & forfeiture contended for. Where A in articles of marriage agreed that if he did not settle a jointure on his wife within two years. he would forfeit his marriage portion and he died before the two years had expired. Now the forfeiture would be the rule of damages. yet the Wife is not alive to make the compensation. According then to the Rule laid down. if there is no rule of damages by which a compensation can be made. & if there is a Rule and yet that can't be a Compensation by reason of some intervening event. they can't contend against the penalty.—

These rules are not independent of. but subsequent to the Gen.l Rule.

"Where one person voluntarily stipulates an advantage or for one of his own certain conditions. the latter must have all advantages from the stipulation unless he strictly adheres to those conditions. though they should be personally. Thus if a Creditor agrees to take less than the amount of his debt. provided the debtor will pay on a certain day. he must pay on that day, or he loses all advantage from the agreement of the Creditor. The stipulation on the part of the Creditor

is

Powers of Chancery

a penalty qualified. - The conditions are in the nature of a penalty, but the penalty in this case does not take effect immediately. — 1 Vern. 220 2 Bro. 481 Public 180 1 Vern. 450.
Although Ch. will compel a man to be just & pay the debt of a penal bond yet it will not compel him to be charitable.

It is also a Gen. Rule that where in Ch. Equity will relieve against a penalty in favour of one party it will of course decree a specific performance in favour of the other party. and on the other hand it will not enforce the specific performance where it will not relieve against the Penalty. This is founded on principles of Justice. As Ch. delivers the party of the advantage he might have of the penalty at Law, it will compel the other party to do Justice (as to perform his part of the agreement) so if A covenants to convey to B. under a penalty Ch. will relieve against the penalty & decree a specific performance: but the other hand it will not decree a specific performance where it will not relieve against the penalty. because the penalty 1 Bro. 241.
is the substance of the agreement and tho' in any case Justice does not require that relief should be had against it. The party can enforce the penalty at Law which

Courts

Power of Chancery.

being the substance of the Argument.

Ch^y would not intefere because it would give the party a double advantage. —

1 Fonb^e 181

It was formerly holden that where an executory agreement contained a bond, the Party bound had his election to do the thing he agreed to do, or forfeit the penalty: and this is now the Rule at Com. Law. But it is not the present Rule in Equity. It was thus laid down by Ld Hardwicke. Where the penalty appears to be a security for the performance of something collateral, so that the enjoyment of the collateral thing is intended to be secured. Ch^y will relieve against the penalty on one side, and enforce due performance on the other. This must be understood with the qualification above mentioned. "Yet" if the circumstances are such that the performance cannot be enforced on one side without the penalty Ch^y will not relieve against it. —

Bro^k 418
3 Bac^r 641
1 Powell 171
Bro^k 431
2 Vern 136.
2 Rep 191
3 Atk 371
2 Bro^k 538.

For the Com^n Rule see the case of the Penal Bond which is merely "in terrorem" So in the case of Mortgage which is in the nature of a Penalty. —

Relief is generally had by an injunction ordering the party not to sue for the

Powers of Chancery.

The Penalty at Law. This however is not done unless the other party do what is bound to do. But when the Sum to be paid on the non performance of the agreement is in the nature of a stipulated damages Equity will relieve against it. In such a case as this the Penalty is not considered in the nature of a security for the collateral object, but as a compensation for the loss of it. —

In such case also the Party bound by the agreement has his election either to perform the agreement or pay the Penalty stipulated. Sure the common Law Rule shall hold.

Thus in a Lease the Lessee covenants to pay 5£ for every acre of meadow land he plo-ughs. Chy will relieve against it & it appears from the structure of the Covenants & appears that the election was to be on his part. The Sum is in the nature of liquidated damages. In such a case Chy will not de-cree a specific performance nor enjoin the Tenant not to plough. But if the Lessee covenants that he & his assigns for ever shall not plough the meadow. and at the close of the agreement a Penalty is annexed Sure Chy will enjoin the Tenant not to plough. and if he should plough on the same principles it would relieve against the Penalty.

2 B. C. 417
1 Ves. Jr. 142
2 Vern. 119
2 Eq. Ab. 32

4 Bro. 2228.

Authority of Judges

Powers of Chancery.

Tho much of the nature of a penalty & called and a sum in the nature of liquidated damages. What the sum is of the nature of one or the other of them depends upon the construction of the whole instrument. The object must be seen and its good sense consulted. It observed that at Com. Law when an action was brought for a penal sum due. the whole sum could be given The Com. Law knows nothing of Chancering Penalties. But now by Statute of 8 and 4 of William and Mary and 4 and 5 of Anne. both of Law are allowed in some cases to Chancery Penalties. The penalty is usually paid & the sum due. but they have to ascertain the damages.

1 Bac. Ab 44
Cons. 35
3 Bac. 691
1 Ch. Ca. 130
Fonb. 1. 250

In this State Penalties have been Chancered in both of Law under the equity of Statutes of Connecticut 27

When a Court of Equity relieves against a penalty. it frequently orders an issue "quantum damnificatum" & the award be sued according to the verdict. In many cases this is not necessary, though in many other cases it is absolutely necessary, as "penalty for breaches. and not the forfeiture of Condition. as when the damages are in

1 Fed - 442

any

Court of Chancery

any degree punishment. In these cases Ch^y 2 Powell 214.
leaves Law and never considers damages.
Thus much of the cases in which Ch^y will grant a Specific Performance of Cont^s
But Ch^y has the power of setting aside Agreements in certain cases. And I would observe here that when Ch^y sets aside an Agreement the relief is Specific —
In Law when the Contract has been unlawfully obtained after the Ct have enforced the Contract they will give the other party damages. But Ch^y will set it aside in the first instance and the relief is there Specific. e.g. Suppose a bond is fraudulently obtained from another in a Ct of Law and Court does not litigate the Contract or Bond. But a motion may be had upon it. Also a Ct of Law will give damages for the deceit practised. But in Ch^y an Injunction will issue to prevent the party suing on the Bond. Hence in that case it is superior. It does not follow however from Ch^y refusing to decree a Specific Performance that the Ct will grant relief on the same Contract. —
As if A claiming under an agreement sends a Bill for Specific Performance and his dismissed. It does not follow that B by a Bill. Vol 2nd 342-3

Exam. of Chancery

Bill may have this argument set aside. —
It is different at Law where the Contract is either enforced or destroyed upon a judgment upon the merits of the case & issue is tried but Bill with a Ct. of Eq. at discretionary whether to issue or not. Thus are many cases in such Ct. stated
That upon a Bill for a specific performance of an agreement. if appears to the Court to be unreasonable on the part of the Defendant it will never decree a specific performance altho' it is not attended with Fraud. and altho' they will not decree they will not set aside the agreement

2 Vern 143
Do — 225
5 Mod 548
Show P. 5. 20. —

That on many other cases in which Ct. will refuse to decree than there are cases where it will set aside on agreements. Fraud in a Contract is good cause for setting it aside and unreasonableness altho' it will not set aside yet is evidence of Fraud.

2 Vern 145
3 Ch. Ca. 203
3 Do — 290
Eq. Ca. Abr. 330
2 Ch. Ca. 334
2 Mod 829

In Law every species of Fraud will not set aside a Contract

Even in the case of executory contract by Parol & Agreement where to carry them into effect by reason of Fraud in the consideration. As e.g. if A buys Goods of B and by reason of B's misrepresentation gives far more than double the value upon the

action

Equity Jurisdiction.

action for the price of Land. goods. it will be no bar to a recovery that an Incumbrance existed &c

Chancery will relieve against a Contract obtained fraudulently.

Hence a general Rule that it will relieve against fraud obtained by imputed Laudanum. Though there is no Actual deceit in the case. as if a Mortgagor and Mortgagee agree that if the interest is not paid by such a time the interest shall be added to the principle and become the principle Money. Chy will relieve against this —

But if such an agreement between the Mortgagor and Mortgagee is attempted to be satisfied by the Mortgagor knowing the extent of his right that he can be relieved against it. it will not be set aside. the agreement is not void. but voidable in Equity

In Case any Contract obtained by any degree of coercion not amounting to actual Duress is good. But in Chy any degree of coercion so as to vitiate the free Judgment of the parties. and cause him to act under the influence of that fear. though it does not amount to Duress will set a Contract aside.

a "fortiori" Chy will relieve a Contract which is not only improvident but unlawful.

Jon 172 41
2 Salk 449
2 Vern 145
Do — 138.

2 Vern 152
3 Atk 394
1 Do — 472.

2 Vern 48
Do 153

Powers of Chancery.

There are two grounds for relieving "viz" Unlawfulness and Oppressions. But the Case is different as to illegal Contracts. Tho both Parties are equally guilty Relief is not refused

The Ch of Exch will relieve in that Case.

So in the Case of Gambling, both parties are here in the wrong. But in the Case of usurious Contracts only one party is criminal.

The Law does not deem the Borrower guilty And in general any unfair practices on the part of the Pltff to the disadvantage of the Defdt will prevent a decree in his favour.

Cowp 200
1 Eq. Ca. 98.
2 Vern 150.
2 Powell 150
Salk 41
3 Atk 358
2 Ves 227.

The Pltff must come into Court with clean hands.

Thus if there was a misrepresentation as to the value of the subject of the Contract the Ch will not enforce it but will set it aside.

And an suppression of a material fact to the disadvantage of one of the Parties. Tho a strong obligation to a decree in favour of the other party. "Suppressio veri et suggestio falsi" (i.e. it stands on the same ground

A lease A wished to let & and to B and told him that it yielded 60£ rent yearly which was true, but did not tell him that it wanted one fourth of that sum laid out in repairs yearly. and as B had no means of knowing it

1 Ch Ca 140
2 Vern 61 533
1 Ves 383.

Ch refused to decree a specific performance.

The Case of this kind are where the Pltff brought a Bill for a specific performance

But I should suppose that when a Bill was brought to set the Contract aside it could not be granted. So also in some cases where the parties are under a misapprehension or misconception without any fraud or unfairness on either side. The Bill will not only be used as a defence in performance but it will not set aside the Contract, on a Bill brought for that purpose. As where A made an agreement to sell an Estate and sold it for half its value by a mistake in its quantity. It being a Leasehold Estate was sold as a Freehold. The Bill known on the subject is, if the misconception is the cause of the agreement it will be set aside. But if it was such a mistake as could not have prevented the agreement from being made it will not be set aside

2 Ves. 3 B. C. 226.
2 Ves. 225.
1 Vern. 400.

There is a very strong and singular Case of this kind where it appears that misapprehension arose from ignorance of the Law. In such Cases the Bill will not generally intervene. The case alluded to is what is called the "Schoolmasters Case" where one of two brothers dies leaving a fee simple estate. The elder brother claimed it as belonging to him, and the younger as belonging to him. They agreed at length to leave it to a Knowing Schoolmaster. who having read in a book entitled "Every man his own Lawyer"

That

Powers of Chancery

That in Intestate always descended gave it to the younger Brother in consequence of which the Elder Brother entered into an agreement with the younger Brother to divide it. But afterwards being better informed or advised the elder Brother brought a Bill in Chancery to be relieved and relief was granted him. This is contrary to the principle of Law and Equity. for if an agreement was written differently from what was intended by the parties relief may be had against it in Equity. But if there is a mistake in fact the Law relief can't be had.

2 Vern 191

Against a Gen[l] Rule that a Ct of Eq[y] will not enforce a voluntary agreement such an one as is not binding in Law ——

The intervention of Eq[y] is for the purpose of giving a more adequate relief than a Ct of Law can do. But in this case a Ct of Law can give no relief. therefore Eq[y] will give none.

1 Vern 34
2 Do 242
1 Salk[d] 10
1 Stra[d] 738

For this a Gen[l] Rule. Though not an universal one that Eq[y] will give no relief where a Ct of Law will give none. ——

But a consideration of a doubtful right is a sufficient consideration to support an agreement. and where there is such a consideration the agreement is never considered as voluntary in Equity.

1 Salk[d] 10
1 Ra[y]m 720
2 Vern 200
1 Do 120

Thus if an agreement is entered into be-

tween-

Power of Chancery

between two persons to settle the Conveyance of their Lands. Chy will decree a Specific performance. Thus was the case of Lord Bal-timore and Gov. Penn. yet there is no agreement to pay money or convey Land and it would seem as if the agreement was voluntary. This Case may stile the mind to be easily against the Schoolmaster Case. But still the two Cases stand on different grounds. A mistake in Law is different from a Compromise of a doubtful right. for in the latter case it may not be a matter of Law but a matter of Fact which is doubtful. and if was a matter of Law it would stand on very different grounds. (In the case of the Schoolmaster the ground of the Eldest sons executing the agreements or Contracts was a matter of Law but the ground in case of a doubtful right is very different.

2 Atk. 587
Do 592
1 Atk. 10.

(It is a Rule of Equity that agreements obtained by coercion or Fraud ought to be set aside. Thus where a Treaty of Marriage between A. & B. B. the Infant being a Minor and her Guardian an old aunt threatened to treat with the match unless the intended Husband would release her all the mesne profits of the real Estate during her Guardianship. and

he

Powell of Chancery.

1 Ves. jun. 93 — 118
1 ... 11
1 B. C. C. 63 q
Do 361 q

Ch^y will not compelled for fear of having his Gift afterwards set aside. —

But mere filial reverence for a Father is not sufficient per se to have the agreement set aside. But if this reverence should be made use of for the purpose of obtaining the Contract it would be set aside.

Intoxication of the party at the time of making the agreement is not sufficient reason for setting aside the agreement unless the party using for the enforcement of the Contract occasioned the intoxication for the purpose of obtaining the agreement or Contract from the other party.

The ground of the relief would then be the fraud used not the intoxication of the other party per se. And if one party should get the other intoxicated and then make a Contract with him even though it should be a fair one the Ch^y will not enforce it for he comes to Ch^y with polluted hands. And I suppose Ch^y would set it aside on this ground.

1 Vern. 94
Vern. 193. 1 q
3 P. C. 130 n
1 Powell 29.

Again mere misunderstanding of the party be legal Comprehension is not a ground for setting aside the Contract. For Courts cannot discriminate between the different shades of intellectuals men.

Power of Chancery

The enquiry in a Ct of Equity is not whether this Bond was executed understanding what that Party: The Rule is established the Same that if he is legally qualified or "Compos mentis" his Bonds shall not be ground of relief, 3 Ves. jun. 139. 19 Ves. 30. there must be some Mistake and the decisions would be vague and uncertain. Yet want of Understanding may be evidence of Fraud. The only difference between a Contract made by that and any other man is that in the former case Ct will give relief on slighter evidence than in the latter.

It is to be found that agreements speculative fraudulently on Sale of persons will always be set aside in Ct. And this is one of the strongest grounds for which Ct will set aside Contracts. Such an agreement is now void at Law. So where upon an agreement with a Bankrupt the Creditors agreed to take off with 10 Shillings on the Pound and the Bankrupt to indemnify them so do that who were averse agreed to pay them 5 Shillings more on the Pound. This agreement was void at Law because it was on Fraud. Contracts of this kind don't admit of subsequent satisfaction. They avoid "ab initio" because if they could be satisfied they might impose fraud on third persons.

15 Ves. 322-5.
17 Ves. 156.
2 Jacob 125.
— 80 171.
18 Ves. 64 88.
17 Ves. 348.
17 Ves. 37.51
4 Ves. jun. 196.
2 Do. — 203.
1 Bos. & Pul. 95.
Do. — 286.

Power of Chancery.

2 Powell 175
1 Vern. 602
D. 478.
3 Pr Wms 75
1 D. 495

When a Suit is pending by one party in an agreement on the other side the other may if he pleases satisfy the agreement: but if a Fraud is imputed on a third person in an agreement it can never be satisfied.

On a marriage treaty depending there was an objection on the part of the Husband's Relations because the Eldest Sister was not large enough. The brother agreed to execute a Bond of 3500£ to him, which was done, and she accordingly gave an instrument to the brother to release it &c. In fact she gave a release of it: the Bond has been destroyed, and the parties were married. Afterward the Husband brought a Bill in Chy to set aside the release and it was set aside.

In the principle Marriage Brokage Bonds are void, (i.e. Bonds given by one person to another on consideration of procuring for him such a match) they have not been allowed the least countenance in Chancery and the influence and misrepresentation strangers should not mix in such delicate matters. I believe in Law they would be void.

13 Vin. 479 pl 23
12 Mod 515

Contracts with Infants are always set aside. Formerly unless they were disadvantageous to the Infant they would not set them aside. But the Rule is now altered they are radically defeated and it matters not whether the Infant was an infant or not.

Powers of Chancery.

This Rule is founded on consideration of Gen[l] Policy. Such Contracts tend to create dissipation and lead to vice. They render him independent of their ancestors. and excite rebellion against Parents. And if when the death of the ancestor the heir shows by proof the Contract to be actually corrupting. the Ch[r] will in many cases set it aside. though not always.

2 Powell 181
2 Vern[r] 14. 27.
1 P. Wms 310
2 Do 247
2 Ves[y] 148.

The rule is if the original contract is shown to be fair. and to appear to be fully satisfied. and the suit has within that it might be set aside. the Satisfaction will not be set aside. otherwise it will.

1 P. Wms 320
2 Ves[y] 159
3 Do 292
1 Ves[n] 42
2 Powell 183.

In general Ch[r] will not enforce a Contract which tends to extortion or oppression though the thing itself would not be immoral yet if it would tend to immorality it will be set aside. or at least not enforced. The case cited to establish the rule is one where the H[y] wished to enforce a Contract but the Chancellor would not enforce it. because the Contract stipulated for an assignment of the Paymastership which tended to intemperate and drunkenness. &c &c

1 Ves[y] 238
2 Powell 259

Thus far of the Power of Ch[r] to vacate and set aside Contracts.

(508)

Powers of Chancery.

Chancery exercises the power of Set Off
a Thing unknown to the Common Law, &
takes the Contract entire and directs
Arbitrators to award B a sum & A
award A 100£ & dismiss Contract. Now in
an action by A. B can't plead a Set Off
of this debt of 100£ by Note

3 Bl. Comm. 304
4 T. Rep. 123
6 Do. 456
Comyns 56.

By Statute 2 and 8 of Geo. 2nd he may
thus plead. But Ch. will decree a Set Off

2 H. Bl. 440
1 Do. 65.

The Set Offs are peculiar matters where
one of the parties are insolvent.
Ch. will not always however enjoin Set Off
In Connecticut Ch. is in the constant
practice of decreeing Set Offs.

It is impolitic for a Ct of Law upon any
principle of Com. Law to consider a Set Off
as a defence. They have only to consider whether
the Contract was made: whether it is good:
and whether it shall be discharged:
Because the Defendant has a debt against
the Pltf. this is no payment or discharge of
the Pltf's debt.

Under our State Law, in this Subject of
Ch. Proceedings are final proceedings in
Equity are to be brought before the Gen. Assembly when the thing demanded exceeds
$5335. between that sum and 100£ the Susp.
Court take notice of the proceedings and
under 100£ the County Court.

Power of Chancery

I believe there has been no case brought before the Supreme Ct. where the sum was too large. Indeed the provisions in our Statute that the assembly shall have cognizance of suits over 1000 £ are a disgrace to it.

In our Cts of Chancery Proceedings there is no appeal from one Ct. to another but a writ of Error will lie. In England there is no writ of Error but an appeal. When the value in question is doubtful the alleged value determines the jurisdiction.

Power of Chancery to issue Injunctions.

An Injunction is a Prohibitory writ the object of which is to restrain a person from doing what is contrary to Equity and Conscience. 3 Bac 172

Injunctions are issued in a variety of Cases.

The most usual writ of Injunction is that issued against the Plff. to stay proceedings in some Suit at Law. and this issues upon some equitable ground not cognizable in a Ct of Law (i.e.) when some grounds of which a Ct of Law can't take notice. As in the case of a Penal bond which is sued at Law. the Defendant may bring a bill in Ch^y that a writ of Injunction may

issue.

Courts of Chancery.

3 Bac 173. Issue to stay proceedings upon patents, principles in equity and Law.

But Ch. Ct cannot issue an Injunction upon any Criminal Case at Law.

6 Mod. 107 3 Bac. 173. The rights enforced and the wrongs redressed in Ch. are always Civil.

The Ch. of Ch. may issue an Injunction to Stay Waste. in Cutting timber &c. —

A Ct of Com Law can only give damages for committing Waste. but Ch. Ct can give

3 Bl. Com 438 2 Fonb. 2 Mitf. 124 2 Ch. Ca. 31 2 Cont. 51. a perpetual Remedy. The damage given at Law may be very inadequate. This Injunction may issue in favour either of the remainderman or reversioner.

But an Injunction to Stay Waste will issue not only in those cases where action of waste will lie at Com Law. but in many other. At Com Law Waste lies only for the immediate remainderman or reversioner. In Ch. a remote one may have the Injunction. The reason in the former case is, if it would do, at Law the remote remainderman would destroy all the intermediate remainderman for he would receive the Land. —

But in Ch. the Land is not recovered. The

Fonb. 450 3 Atk. 723 3 Bl. Com. 227 1 Vern. 26 3 Atk. 94 Injunction being merely a preventive remedy. it does not put the remainderman or reversioner into possession of the Land. —

Powers of Chancery.

An Injunction to stay Waste will issue in Ch.t in the case of a Mortgagee.

The Mortgagee in possession can recover damages at Law by the Mortgagor in an Action of Waste for he may commit Waste. But in the case of Ch.t the Mortgagee has only the equitable Estate and therefore he can't or at least may not commit Waste and an Injunction of Course will issue to stay Waste. And I should suppose the case of Rents in the case of Timber for example when if cut down and applied to the payment of the debt it would be ground for an Injunction. 3 Atk.s 333 3 Coms 451.

On the other hand an Injunction will issue in favour of the Mortgagee against the Mortgagor. Ejectment will not lie at Law because the Mortgagor is considered as Tenant at Will if Credit when he commits Waste he immediately determines the Estate for it then is unpassed all privity of Estate being gone. Vol 5th 82-5.

But Ch.t will issue this Injunction for the Mortgagor has no right to diminish the value of the Pledge. Tho a remedy might be had at Law by suing in an Action of Ejectment. But this might be inadequate. Again an Injunction may issue against a Tenant for Life without impeachments of Waste as the case may be.

Powell's Chancery

17 Vern 33
Salk 161
2 Chan Ca 60
2 Ch Ca 819
Finch 107

At Com Law no action of Waste would lie without an Entruchment for Waste: For cutting an Injunction will not issue it will issue only for great and outrageous act of Waste. And in a case of this kind if he has committed Waste by demolishing either in whole or in part Buildings Ch will decree a speedy relief for the Injury done by repairing the Buildings and putting them in the same plight in which they were

An Injunction to stay Waste may sometimes issue against Him who hath the inheritance at Com Law as Trustee. ——

Now at Com Law the action of Waste lies only in him who hath the inheritance against one who has the Estate only for life or years. But the Trustee has the inheritance because the "Cestuy que trust" is not known at Law. but little is merely equitable and as it is so Ch will order the Trustee to perform the trust so as to convey the legal interest. or to stay Waste which he threatens from violating the Trust.

2 Com Ca 51

An action of Waste will not lie against the Tenant in tail after possibility of issue extinct but Ch will in this case if proper grant an Injunction to stay Waste.

18 Ch 1 221
2 Com Ca 502.

This man is in the same plight as a Tenant for years without impeachment of Waste.

Equity & Chancery.

If the waste is outstanding court. an Injunction will issue

An Injunction may also issue to restrain a Nuisance. as if one is about to raise a building which will stop ancient lights. An Injunction will issue to prevent &c. tho' even when the building was raised. damages might be given. But in either case the lights must be ancient. and such as extend beyond the memory of Man. The right must be founded on prescription or agreement or the law but not those under which they claim. It may be observed that though the lights are not in point of fact ancient lights yet when one has built and his lights look upon another's land. and they have been enjoyed a considerable length of time. the Jury will presume an Enjulgement.

9 Viner 432
15 Gilb 29
2 Ves 2698
1 Ves 453

An Injunction may issue to prevent one from building on another ground. but will not lie even for the purpose of. if there an Injunction. Contain. that a Nuisance. which would not subject him to actions at Com Law. as such. In that case an Injunction will not issue to prevent the building. if a good house for this is not at Com Law a Nuisance.

3 Bac 174
3 Mk 750
1 Fonb 29
2 Rolle 13 9.

Cases of Nuisance.

Where the Injunction will not issue to stay Common: for such damages glanced at here are sufficient. Yet if they are continued for any length of time so as to become a Nuisance an Injunction will issue —

3 Atk. 21
6 Com. Dig. 52

That such in all instances where mere Trespass may by continuance become a Nuisance. an Action will not lie at Law for a Nuisance there it is a mere Trespass.

Relief in an unconscientious claim or agreement is effected by Injunction. and so has the Equity of the Defendant at Law (who is Plff in the Bill) arises out of the cause of the Plff at Law (who is Deft in the Bill) an Injunction will issue to stay trials.

2 Ch. Ca. 66.
7 Ves. 93.
3 Bac. 174.

So also where one Judgment at Law of Law is not a bar to another between the same parties and there have been several Judgments all in favour of the same party and suits are still brought. Ch. will issue an Injunction to quiet the title of the successful Party. This is the case in Actions of Ejectment where the nominal Plff may be altered a thousand times.

2 Bro. P. C. 8 in Ch. 261.

The names of the party on record are different. one action is not a bar to another for the same cause. There are also other cases where an Injunction may issue

Powers of Chancery.

to quiet the possession in possession of those who have a Legal & equitable Title — and that even in possession for a long time & Q. Cestuy que Trust who has been in possession for many years

An Injunction may issue upon bills in Cases of Ejectments, to prevent a multiplicity of Suits respecting the same rights. When many suits are pending, or are likely to happen because an action can't settle the question. Ch. will issue an Injunction and thus draw the question within its own limits or Jurisdiction, and settle it at once. — as where there are several Tenants of the manor claiming the profits. So where a multiplicity of suits about to take place respecting the boundaries of Land. Ch. will call the parties and settle the Business at once. It was on a principle analogous to this that the Case of Boardman vs Spyman was decided in the Supreme Court. February 1800. — in which the Ct decided that where there were more than two parties an action of account would not lie against one of them as it would tend to a multiplicity of Suits.

So also an Injunction may issue pending a controversy between two or more persons.

2 Ves. jun. 155.
2. H. Bl. 282.
4 Bac. 174.

1 Ves. 2 and. 4
Do. 104. 278.
1 Ves. 82. 318.
Do. 200.
1 Ves. 282.

Vol 3d. 182

Powers of Chancery

Persons claiming to be Proprietors now used to issue to restrain them from acting as Proprietors till the right is determined. There is no other way to prevent them than by applying to Chancery.

1 Ridge 183
2 Rand 93

The Injunction may issue where one invades the literary property of another. It may issue in favour of Authors and Inventors to restrain any person from publishing their works or imitating their inventions. The last mentioned question whether at Com. Law there is any exclusive right to literary property. But it has been decided that there is both in Kings Bench & House of Lords where it was decided 6 to 5 that the Com. Law remedy took not away that by the Statute of Anne. Ld Mansfield was among the five. Therefore there is the weight of authority against the last decision. The identity of literary property consists in the sameness of the Language and Sentiments. But a "translation" or an abridgment is no cause of action by the owner of the Copyright.

Amb. 104
1 Ves. Sr. 30
Atk. 124
1 Vern. 120
62. 275. 127
4 Bur 2338.

2 Bl. Com. 405
2 Atk. 141
1 Bl. Rep. 451.

Books printed in England and reprinted in another County and imported into England are subject to the imposition and the seller to penalties by a late Statute.

2 Bl. Com. 407 note

Finis.

REEVES'S
&
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LECTURES.

VOL.
4

N. M.